(30,452)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 487

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, APPELLANT,

vs.

W. W. WILKINSON, TRUSTEE, AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

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[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS**

Before the Honorable Glenn M. Smith Referee

In the Matter of WALKER GRAIN COMPANY, Bankrupt

PETITION—Filed March 26, 1921

To said Honorable Referee:

Now comes your petitioner W. W. Wilkinson, duly qualified and acting trustee of the Walker Grain Company, bankrupt, and complaining of the Farmers & Mechanics National Bank of Fort Worth, Texas, respectfully moves the Court to require said bank by summary order to restore to the said bankrupt estate and to pay unto your petitioner for such purposes hereinafter designated, sums of money, and as grounds for said motion respectfully alleges:

That on or about the 1st day of January, 1919, the said Farmers & Mechanics National Bank of Fort Worth, Texas, consolidated with and succeeded the American National Bank of Fort Worth, Texas, such consolidation and succession being effected under the law of the United States in such cases made and provided and under such laws the said Farmers & Mechanics National Bank assumed and became bound and liable to pay all the liabilities of the said American National Bank and the said Farmers & Mechanics National Bank also by express agreement with said American National Bank agreed to pay all outstanding liabilities of said bank at the time of such consolidation and succession.

Your petitioner would show that the petition in bankruptcy upon which the said Walker Grain Company was finally adjudicated a bankrupt, was filed on the 16th day of August, 1918, and that the said American National Bank, which was then in business, had actual notice of the filing of such petition upon the day that the same was filed or in all events upon the next day, after the filing of the same.

That on July 27th, 1918, at a time when the said Walker Grain Company was hopelessly insolvent and owed a large amount of debts and suits for receivership and other suits pending against it, the said American National Bank, with full knowledge of such insolvent condition of said Walker Grain Company, made a loan to the said Walker Grain Company, of the sum of $10,000.00, which sair loan was made for the purpose of paying off and taking up an over-draft in the account of the said Walker Grain Company with said bank. That in consideration of said loan, the said Walker Grain Company made, executed and delivered to said bank, its promissory note of said date in the sum of $10,000.00, payable on demand, with interest from date until paid at the rate of — per cent per annum. There-

after on or about the 9th day of October, 1918, the Walker Grain Company paid upon said obligation the sum of $1,650.00 and thereafter on or about the 2nd day of November, 1918, said Walker Grain Co. paid to said American National Bank upon said obligation the further sum of $8,560.00. That said sums of money were paid to said bank with the intention both upon the part of the Walker Grain Company and said bank to pay and accept said sums of money as a preference upon said obligation over and above amounts going to other creditors and with an intent to hinder, delay or defraud and defeat the other creditors of the said Walker Grain Company, and that the payment of said money was a detriment to and a disadvantage to the other creditors of the said Walker Grain Company, who hold provable claims against the said company to the extent of approximately $150,000.00.

[fol. 3] That the said Farmers & Mechanics National Bank is financially able to restore the said monies.

Wherefore, your petitioner prays that said bank be cited to appear and show cause why said sum of money with legal interest should not be summarily restored to your petitioner as trustee of said bankrupt estate.

Respectfully submitted,
(Signed) Frank P. Culver, Jr., Attorney for W. W. Wilkinson, Trustee in Bankruptcy of the Walker Grain Company.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

To the Farmers & Mechanics National Bank, Fort Worth, Texas:

You are hereby notified that on the 26th day of March, 1921, there was filed in this Court by the Trustee in Bankrupty of the above estate, a motion of the said Trustee to require you by summary order, to restore to the said bankrupt estate, certain moneys and assets alleged to belong to said estate, and now being withheld by you, as more fully appears in said motion, a copy of which is attached hereto.

You are hereby cited and admonished to be and appear before the undersigned Referee in Bankruptcy at his office at 403 Fort Worth National Bank Bldg., Fort Worth, Texas, on the 1st day of April, 1921, at 2 o'clock to show cause why the relief prayed for in the said motion should not be granted.

Ordered further that a copy of this order shall be mailed forthwith to the said Farmers & Mechanics National Bank, Fort Worth, Texas, to the bankrupt, to the bankrupt's attorneys of record in this cause,

to the Trustee, and to the attorneys of record for the petitioning creditors.

Given this the 28th day of March, A. D. 1921.

(Signed) Glenn Smith, Referee in Bankruptcy.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed April 7, 1921

To the Honorable Glenn Smith, referee:

Comes now the Farmers & Mechanics National Bank in response to the notice herein issued and served upon it, requiring it to appear before the Honorable Referee on the 1st day of April, A. D. 1921, at two o'clock to show cause why it should not pay over to the Trustee the Ten Thousand ($10,000.00) Dollars mentioned in the petition of the said Trustee herein filed, and appearing for the sole purpose of objecting to the jurisdiction of the Court in respect to the matters set forth in said petition, and for such purpose respectfully shows:

1

This respondent respectfully says that the Trustee herein may not maintain an application, motion or suit to set aside the alleged preference set forth in the said motion and to litigate and have determined the right of this respondent to the money therein mentioned without the consent of the respondent, for that the Referee is not a Court of bankruptcy, and the matters and things averred in the said motion are justifiable only in a Court of bankruptcy within the intent and meaning of the bankruptcy law and may not be determined by the Referee in the matter here sought.

2

Respondent further respectfully excepts to the jurisdiction of the Referee and the Court respecting matters contained in said motion to compel the respondent summarily to pay over to the said Trustee the Ten Thousand ($10,000.00) Dollars, for that this respondent was not and is not a party to the bankruptcy proceeding, and respondent may not be compelled to appear and litigate with the said Trustee in respect to said alleged preference, and submit to the summary jurisdiction of the Court for the purpose of determining its right and claim to the said Ten Thousand ($10,000.00) Dollars.

3

That long prior to July 27th, 1918, the Walker Grain Company was a regular depositor in the American National Bank, the predecessor of this respondent, and had been and was on the 27th day of

July, 1918, conducting a grain business in the city of Fort Worth, and on the latter date, the respondent loaned the said Walker Grain Company Ten Thousand ($10,000.00) Dollars which was by the said Company deposited in the usual and ordinary way to its credit in the bank; that said loan was not made as averred in the petition especially to cover an overdraft, but for the purpose of being used by the Walker Grain Company in handling and carrying on its business; that at the time said loan was made the said Walker Grain Company executed to respondent or its predecessor, its note for said Ten Thousand ($10,000.00) Dollars as alleged in said motion, and said Company at said time received the present and full value of said note, to-wit; Ten [fol. 6] Thousand ($10,000.00) Dollars deposited in the usual and ordinary course of its business, and in the usual manner to the credit of said company in its general and checking account in the said bank, and was not for the purpose of paying an antecedent indebtedness due by said Company to said bank; that thereafter on the 9th day of October, 1918, and on the 2nd day of November 1918, respectively, payments were made on said note and the same thereby fully paid off and discharged.

4

This respondent denies that the said Walker Grain Company was insolvent at the time said loan was made and respondent denies that at the time said loan was repaid to it, it was its intention to accept said sums of money as a preference upon said obligation over and above amounts owing to other creditors and denies that it accepted same with the intent to hinder, delay, defraud or to defeat the other creditors of the Walker Grain Company. Respondent denies that the payment of said loan was a detriment to and a disadvantage to other creditors, if any, of the said Walker Grain Company. This respondent further denies that it was the intent and purpose on the part of the said Walker Grain *Grain* Company to prefer the Bank over its other creditors, or to delay, defraud or defeat its said creditors, and avers on information and belief that it was the object, purpose and intent of said Walker Grain Company to procure the loan for the purpose of carrying on and conducting its business in the usual and ordinary way. That respondent having made said loan in good faith and for the purpose herein set forth said Walker Grain Company continued its business with respondent or its predecessor up to and including the dates on which said loan was paid off, and that under and by virtue of the terms and provisions of the bankrupt law respondent had the right to set off and apply the deposits of the Walker Grain Company in said Bank, either by check or by transferring the amount from the account of the Walker Grain Company to the credit of the bank in payment of said note.

5

That this respondent acting in good faith had the right to loan said Walker Grain Company on the 27th day of July, 1918, said money and accept its note and security for the same, and the said Walker Grain Company, being then an active and going concern,

had the right to borrow money necessary and proper to be used in the course of its business and execute its note in payment of the same, and having lawfully acquired said money and deposited it in the said bank, this together with other sums from time to time being so deposited all subject to its check, and the same being done in the transaction of the banking business in the usual and ordinary way, said transaction was not by the provisions of the bankrupt law unlawful, and being lawful in it- inception the repayment of the money, as hereinbefore stated, was likewise lawful and did not operate as a preference within the intent and meaning of any provision of the bankrupt act. That at the time said loan was made respondent held bills of lading of said company aggregating $6,596.17 as security, and prior to the four months' period respondent had an agreement with said corporation that bills of lading and drafts on purchasers, and proceeds of sales of grain and moneys should be deposited in the bank and stand as security for any and all advancements and loans which might be made said corporation in the course of its business and said payment of said loan was made out of the proceeds of the same or substitutes therefor and was in full force and effect at the time said transaction occurred, the reason [fol. 7] for such agreement being made was to enable said Walker Grain Company to purchase grain and carry on its business.

6

This respondent says that it had no knowledge at the time mentioned of the financial condition of said Walker Grain Company except that it was an active going concern, was entitled to credit at the bank, was paying its current bills as the same matured; that there were no outstanding unpaid judgments existing against it and said company was not within the knowledge of respondent in default in any of its o*l*bigations; that said Company had for a number of years been a regular customer and depositor in the American National Bank and Farmers & Mechanics National Banks which banks had from time to time extended said Company credit by way of loans, all of which were repaid at times and in a manner satisfactory to said banks. It is true that respondent had been informed that applications for a receivership had been filed, but that all of said applications had been denied. As to any other suits this respondent had no actual knowledge, except that any such suits were on contested claims and vigorously opposed by the Walker Grain Company. That on account of the previous good financial standing of the Walker Grain Company, its successful management and its promptness in paying its bills and its previous ability to handle successfully transactions involving large amounts of money, and because of the absence of any knowledge by this respondent of any fact indicating insolvency, or contemplation thereof by the officers of the Walker Grain Company, respondent did not know it was insolvent but believed that said company was absolutely solvent and could and would take care of any reasonable obligation that it might assume, or any liability that might be incurred by

it. In this connection this respondent further states that if it be true as charged in said petition that on the 27th day of July, 1918, there were provable claims against the said Walker Grain Company amounting to approximately $150,000.00, then this fact was wholly unknown to the respondent, and respondent never acquired the knowledge that any considerable sum was claimed against the said Walker Grain Company as being due the complaining petitioners in the bankruptcy suit, until a considerable time after the petition in bankruptcy was filed, and at the time this knowledge was acquired this respondent also was informed that each of the said claims was disputed and contested by said Walker Grain Company, and if any judgments had ever been rendered thereon, or that the same had been finally allowed by any Court this fact was not known to this respondent.

7

That at the time of the transaction aforesaid, this respondent had no reasonable cause to believe that the execution of the same would effect a preference, nor operate in any manner to diminish the estate, or to the detriment of creditors, and it having made said loan in good faith to enable the said Walker Grain Company to carry on its business in the usual and ordinary way, the transaction is lawful and legitimate and respondent is therefore entitled to retain the said sum of money, and if the Trustee herein desires to litigate the matter this can only be done in a plenary suit in a Court of bankruptcy, and not in a summary proceeding before a referee as here sought.

[fol. 8] Wherefore, respondent prays the referee proceed no further herein and that the petition or motion herein filed against it be dismissed for want of jurisdiction.

Slay, Simon, Smith & Morris, Attorneys for Respondent.

Jurat showing the foregoing was duly sworn to by Elmer Renfro omitted in printing.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The hearing just concluded before me, after due notice to all parties interested as required by law, was of a comprehensive character, as it involved a general examination of the affairs of the bankrupt, and also three motions for the restoration of certain sums of money by summary order, one against J. L. Walker, President of

the bankrupt corporation, one against Mrs. M. M. Walker the wife of J. L. Walker and Secretary and treasurer of the Bankrupt Corporation and one against the Farmers & Mechanics National Bank of Fort Worth, Texas, the successor of the American National Bank of Fort Worth, Texas, and since the evidence upon the general examination of the bankrupt and upon the three motions was all included in one hearing, and as the same counsel represented all of the respondents, and no severance of the motions was requested, the findings, conclusions and orders as they appear hereinbelow cover all three of the said motions.

The motion directed against J. L. Walker prayed that he be ordered summarily to return to the Trustee, approximately Seventy-Five Thousand Dollars ($75,000.00) in Liberty Bonds which were claimed by the Trustee to be the property of the bankrupt corporation, and it was also prayed in said motion that the said J. L. Walker be required to return to the Trustee, certain items of money that has been paid to him by the bankrupt corporation, both before and after the filing of the petition in bankruptcy.

It was prayed that Mrs. M. M. Walker be required summarily to return to the Trustee certain amounts of money paid to her by the bankrupt corporation after the filing of the petition in bankruptcy.

It was prayed that the Farmers & Mechanics National Bank of [fol. 10] Fort Worth, Texas, be required by summary order to restore to the Trustee the sum of Ten Thousand Dollars, $10,000.00 paid to it upon a note after the filing of the petition in bankruptcy, together with the legal rate of interest upon said amount from the date or dates of said payment.

All of the respondents in due time and in proper form filed objections to the summary jurisdiction of the Referee, and subject to such objections, made full answer to the motions of the Trustee. All of the questions were fully submitted by evidence and briefed and argued by respective counsel.

I find the following fact from the evidence:

That the bankrupt corporation, the Walker Grain Company was organized in the year 1911, with a capital stock of Twenty-Five Thousand Dollars ($25,000.00) and that J. L. Walker was its organizer, principal stockholder and President. That at all times since its organization, the said J. L. Walker has been President of said corporation and has owned practically all its stock, the other stockholders being all relatives by blood or marriage, and the said Walker has wholly dominated and controlled all of the affairs of the corporation, and has in reality, operated the corporation and used its funds in business very much as he would have his own personal business. That the Walker Grain Company's business consisted of the buying and selling of grain, principally in car loads and the general method of handling of such business, was for the corporation to contract for the purchase of grain at future delivery and then re-sell the grain in the cars and divert the car to the purchasers.

I find that up to July, 1918, the said J. L. Walker had never been paid any salary by the corporation, and that the first item of salary claimed by the said J. L. Walker to have been paid to him by the corporation, was the sum of One Thousand Nine Hundred and Fifty One Dollars, ($1,951.00) which he received on July 6, 1918, a little more than one month prior to the filing of the petition in bankruptcy; that this said item was received by the said J. L. Walker in the form of a check drawn by the Bewley Mills of Fort Worth, [fol. 11] Texas, payable to the said Walker Grain Company and appropriated by the said J. L. Walker to his personal use, and according to his testimony, to apply as salary due him.

I find that the bankrupt corporation collected on various claims against railroads and others that were in existence at the time of the filing of the petition in bankruptcy Twenty-Six Thousand Six Hundred Fifty & 33/100 Dollars, in money, and that out of this fund, the said bankrupt corporation paid the following amounts upon the following dates to J. L. Walker claimed by the said J. L. Walker to have been paid to him by the bankrupt upon a contract for salary that existed prior to the filing of the petition in bankruptcy, to-wit:

Nov. 18, 1918	$2,000.00
Nov. 15, 1918	500.00
Dec. 23, 1918	1,000.00
Mch. 12, 1919	500.00
July 23, 1919	1,150.00
Mch. 8, 1920	40.00
Mch. 22, 1920	100.00
	$5,290.00

I find that the said J. L. Walker is financially able to comply with the summary order for the restoration of the said amounts of money with interest.

I find that after the filing of the petition in bankruptcy, and on to-wit: Nov. 14, 1918, the bankrupt corporation paid to the respondent, Mrs. M. M. Walker, the sum of Seven Hundred Sixty Six and 33/100 Dollars ($766.33) upon a debt incurred by the bankrupt to Mrs. M. M. Walker prior to the filing of the petition in bankruptcy, and that the said debt was an open debt and not secured in any manner. I find that the said Mrs. M. M. Walker is financially able to respond to a summary order for the restoration of the said sum of money with interest.

I find that on July 27, 1918, the Walker Grain Company executed and delivered to the respondent Farmers & Mechanics National Bank, of Fort Worth, Texas, its promissory note in the sum of Ten Thousand Dollars ($10,000.00) payable on demand, and that the said bankrupt on said date, advanced to the said Walker [fol. 12] Grain Company, said amount of money. That said note was in no manner secured except by Ten Thousand Dollars ($10,000.00) par value of Liberty Bonds registered in the name of J. L. Walker and claimed by the said J. L. Walker to be his individual

property. I find that there was paid on said note by the bankrupt on Oct. 11, 1918, the sum of One Thousand Six Hundred and Fifty Dollars ($1,650.00) and on Nov. 2, 1918, the sum of Eight Thousand Five Hundred and Sixty Dollars ($8,560.00) and that such payments were not an offset against any deposits of the Walker Grain Company in the said bank, as at said time there were no deposits to the account of the said Walker Grain Company in said bank. That at the time of said payments the bank held no character of lien or security except the liberty bonds aforesaid, claimed under oath by the said J. L. Walker to be his individual property, I find that the said Farmers & Mechanics National Bank of Fort Worth, is the successor of the American National Bank of Fort Worth, Texas, and as such, should be legally held for the liabilities of the said American National Bank. I find that before and at the time of said payments, the said bank had actual notice of the filing of the petition in bankruptcy and that the said payments were made by said bankrupt, and accepted by said bank with the intention to pay and to accept a preference to the disadvantage of other creditors of the Walker Grain Company. I find that said bank is financially able to respond to a summary order for the restoration of said moneys with interest.

I have reached the following conclusions of law.

As to the claims of the Trustee for the Seventy-Five Thousand Dollars ($75,000.00) in liberty bonds, I conclude from the pleadings and from the evidence that the said J. L. Walker has a colorable claim to said property and is, therefore, an adverse claimant, and as to such item, I have no jurisdiction to order its restoration. I therefore, decline to order the said J. L. Walker to restore the said liberty bonds or their equivalent in money, without prejudice, however, to the filing of a plenary suit by the Trustee for the recovery of such funds.

[fol. 13] I conclude that as to the item of One Thousand Nine Hundred and Fifty Dollars ($1,951.00) paid to the said J. L. Walker as aforesaid before the filing of the petition in bankruptcy, that the said J. L. Walker asserts a colorable right to the possession of said money, and that I have no jurisdiction to entertain a summary order with reference to same. I, therefore, decline to order the restoration of said money, without prejudice, however, to the right of the Trustee to file a plenary suit for the recovery of the same.

I conclude that the said J. L. Walker has no right or color of right as an adverse claimant to the aforementioned sums of money paid to him as salary after the filing of the petition in bankruptcy, and must, therefore, restore to the Trustee the said sums of money with 6% interest thereon from the dates of the receipt of the same.

I conclude that as to the Seven Hundred Sixty Six and 33/100 Dollars ($766.33) paid to Mrs. M. M. Walker on Nov. 14, 1918, that the said Mrs. M. M. Walker has no right or color of right as an adverse claimant to the same, and that she must, therefore, restore to the Trustee, the said amount of money with interest from the date of its payment at the rate of 6% per annum.

I conclude that the Farmers & Mechanics National Bank of Fort Worth, Texas, has no right or color of right to the sums of money paid to it as aforesaid, and must, therefore, pay to the Trustee, the said sums of money with interest at the rate of 6% per annum from the dates of said payments.

It is therefore, ordered, adjudged and decreed,

That the said J. L. Walker pay to the Trustee, W. W. Wilkinson, Esq., the sums of money hereinbefore named which was paid by the said bankrupt to the said J. L. Walker as salary after the filing of the petition in bankruptcy, said sums aggregating Five Thousand Two Hundred and ninety Dollars ($5,290.00) together with interest thereon at the rate of 6% per annum from the dates of said payments.

[fol. 14] That the said Mrs. M. M. Walker pay to the Trustee. W. W. Wilkinson, Esq., the sum of Seven Hundred Sixty-six and 33/100 Dollars ($766.33), which was paid to her by the said bankrupt after the filing of the petition in bankruptcy, together with interest at the rate of 6% per annum from the 14th day of Nov., 1918.

That the Farmers & Mechanics National Bank of Fort Worth, Texas, pay to the said Trustee, W. W. Wilkinson, Esq., the sums named hereinabove as having been paid to said bank after the filing of the peti-on in bankruptcy, aggregating Ten Thousand Two Hundred and Ten Dollars ($10,210.00), together with interest at the rate of 6% from the dates of the said payments.

It is futther ordered that all of the above named respondents comply with the respective orders made against them on or before ten days from this date.

That the orders herein made are without prejudice to the Trustee's right to proceed in a plenary suit or suits to recover any or all items, or balance of any items, not herein directly disposed of.

Dated this the 2nd day of June, A. D. 1921.

Glenn Smith, Referee in Bankruptcy.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF FARMERS & MECHANICS NATIONAL BANK FOR REVIEW OF REFEREE'S FINDINGS—Filed July, 11, 1921

To the Honorable Glenn Smith, referee in bankruptcy:

Your petitioner, The Farmers & Mechanics National Bank, respondent in the summary proceedings before the Referee to require it to pay over to W. W. Wilkinson, Esq., Trustee in Bankruptcy, the sum of $10,210.00 with interest as set forth in the order of the Referee of date June 2nd, 1921, respectfully shows, that on the — day of June 1921, an order, a copy of which is hereto annexed, was made and entered herein, said order directing The Farmers &

Mechanics National Bank of Fort Worth, Texas, petitioner, in ten days from the date of said order to pay to the said W. W. Wilkinson, Trustee in Bankruptcy, the sum of $10,210.00 with interest at six per cent from the date of the payments mentioned in said order, dated October 11th, 1918, when it received payment of $1,650.00 and November 2nd, 1918, when it received the sum of $8,560.00 from the said bankrupt.

Your petitioner respectfully shows that such an order was and is erroneous for the following reasons:

1

That the Honorable Referee erred in taking summary jurisdiction for that this petitioner set up by proper plea its objections to the jurisdiction of the Referee, which plea and obligations set forth facts from which it appeared that this petitioner asserted an adverse claim to the $10,000.00 paid it by the Bankrupt in November, 1918, in that said plea and objections to the jurisdiction of the Referee set forth that long prior to the filing of the petition in bankruptcy, it entered into an agreement with the Walker Grain Company, whereby it was agreed and understood between petitioner and the Walker Grain Company that for all moneys advanced the Walker Grain Company by petitioner, it would hold all bills of lading and drafts, and proceeds and substitutes for the same as collateral security for any and all advancements of money made or that might be made Walker Grain Company by petitioner, and it appearing that the payment of said note was out of moneys, the proceeds of drafts and bills of lading for grain deposited in and collected through your petitioner The Farmers & Mechanics National Bank.

2

The Honorable Referee erred in taking summary jurisdiction herein, and in overruling the plea to the jurisdiction filed by this petitioner because the same being under oath and setting up facts showing an adverse claim and it being undisputed by any pleading filed by the Trustee in reply thereto, the Honorable Referee should have sustained the same, and dismissed said motion as against this petitioner for want of jurisdiction.

[fol. 16]

3

Because the Honorable Referee erred in estimating the four months' period from the time of the filing of the original petition, instead of the time of filing the amended original petition.

4

The Honorable Referee erred in holding that the note for $10,000.00 dated July 27th, 1918, executed by the Walker Grain Company to your petitioner, The Farmers & Mechanics National Bank, and particularly described in the order attached hereto, was

in no manner secured, except by $10,000.00 par value of Liberty Bonds registered in the name of J. L. Walker, for that the evidence showed that long prior to the filing of the petition in Bankruptcy the Walker Grain Company made and entered into a contract with the said Bank, or its pred-cessor, The American National Bank, whereby it was agreed that the said Walker Grain Company would deposit therein bills of lading and drafts for grain sold by said Walker Grain Company, in consideration whereof the said Bank would from time to time, advance to said Walker Grain Company sums of money with which to buy grain and that in consideration of such advancements for grain, bills of lading and drafts so received and deposited by the Walker Grain Company, as well as all substitutes and proceeds of the same, would and should be held by the said Bank as collateral security for any and all advancements of money made to said Walker Grain Company, by the said Bank, which said agreement was on the 27th day of July, 1918, the date of said note, in full force and effect; and it further appeared from the testimony that on the date of said note, said Bank had in its possession three certain bills of lading and drafts, which under the agreement aforesaid, were held by said Bank, as collateral security for the payment of said note; and it further appeared that Walker Grain Company ceased to purchase grain on or prior to June, 1918, and thereafter all bills of lading, drawn on purchasers of grain by the said Walker Grain Company and drafts evidencing the same were deposited in said bank, collected through said Bank, and the proceeds deposited therein, and by reason of the aforesaid contract fixing a lien on said bills of lading, drafts, proceeds and substitutes therefor, all such proceeds coming into the possession of said Bank were charged by virtue of the security of the aforesaid promissory note. These facts appearing the Honorable Referee erred therefor in overruling your petitioner's objections to the jurisdiction of the Referee to proceed herein by motion and to direct the petitioner in such summary proceeding to pay over to said Trustee said sum of money.

5

The Referee erred in holding that this petitioner did not become a lien creditor of the Walker Grain Company at the time the loan in question was made.

6

The Referee erred in holding that the payments made on said $10,000.00 note "were not an of-set against the deposits of the Walker Grain Company in said Bank as at said time there were no deposits to the account of the Walker Grain Company in said Bank," for that the evidence shows that there were deposits in said Bank at the time of such payments, and that said note was paid in full out of such deposits. It therefore clearly appears the Walker Grain [fol. 17] Company was indebted to the Bank in the amount of the note and the bank was indebted to the Walker Grain Company in the amount of the deposits applied to the satisfaction of said note.

7

The Referee erred in finding that the Bank held no lien at the time of said payments, because all the moneys on deposit represented the proceeds of grain purchased from the Bankrupt long prior to the institution of these proceedings, all of which were paid for by the Bank and on which the said Bank had a lien for all advancements made.

8

The Referee erred in holding that such payments were made by the Bankrupt and accepted by the Bank with the intention to pay and accept a preference to the disadvantage of other creditors.

(a) Because the evidence does not support this finding;

(b) Because the finding is further erroneous for the loan when made was for a present consideration secured by a lien on the assets of the Walker Grain Company in the hands of the Bank, or coming into the Bank. The payment of the loan, therefore, did not and could not operate legally to the disadvantage or detriment of other creditors with the intent and meaning of the Bankruptcy Act defining preferences.

(c) The undisputed evidence is that all of the money deposited in the Bank at the time of such payments were proceeds from grain paid for by the Bank, on which the Bank held a contract or an equitable lien and in addition a banker's lien, and the application of such deposits to the payment of said loan was but the exercise of a legal or equitable right of the Bank existing and vested at the time the petition in bankruptcy was filed.

(d) There is no proof or sufficient evidence that the Bank knew at the time such payments were made that the Walker Grain Company was insolvent, nor that said Bank had reasonable grounds to believe that said Walker Grain Company was insolvent.

9

The Referee erred in holding that the Referee had power and jurisdiction by motion to summarily direct the return of the money received by a creditor as a preference, there being in such case no other remedy of the Trustee than a plenary suit in a Court of competent jurisdiction, the loan or payment of the loan in question being classed as a preference and sought to be recovered as such by a motion and so found by the Referee.

10

The Referee erred in holding that the Farmers & Mechanics National Bank had no right to the sums of money paid to it in satisfaction of the $10,000.00 note referred to for that the plea to the jurisdiction of the Referee set forth an actual bona fide right and title to the said $10,000.00, it being undisputed by any pleading filed

[fol. 18] in reply thereto, the Reference should have sustained said plea and dismissed the motion for want of jurisdiction.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Farmers & Mechanics National Bank, by E. Renfro, Petitioner.

Jurat showing the foregoing was duly sworn to by E. Renfro; omitted in printing.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed Nov. 21, 1922

This 20th day of November, 1922, coming on to be heard respondents petition for review from a summary order of the referee in bankruptcy requiring the Farmers & Mechanics National Bank of Forth Worth, Texas to pay to W. W. Wilkinson, Trustee, of said bankrupt estate the sum of Ten Thousand Two Hundred and 10—100 Dollars ($10,210.00) with interest thereon at the rate of six per cent per annum from the date of the payment of such sum by the bankrupt estate to the said bank; and the certificate of the referee with findings of fact and conclusions of law being before the Court and the Court having heard argument of counsel is of the opinion that the said findings and conclusions of the referee are correct.

It is therefore ordered, adjudged and decreed by the Court that the said Farmers & Mechanics National Bank of Fort Worth, Texas, pay forthwith unto the said trustee in bankruptcy the sum of Ten Thousand Two Hundred & 10—100 ($10,210.00) Dollars with interest thereon at the rate of six per cent per annum from the date of said payment as found by said referee. That the said respondent pay all cost of this proceeding.

James C. Wilson, Judge.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

Summary Proceedings to Require said Bank to Pay to the Trustee Certain Moneys

PETITION FOR REHEARING AND ORDER OVERRULING SAME—Filed Nov. 28, 1922

To the Hon. Jas. C. Wilson, Judge of said Court:

Now comes the Farmers & Mechanics National Bank of Fort Worth, Texas, Respondent, herein and respectfully prays the Court to set aside the judgment and order hereinbefore entered herein by this Court approving the findings of the Referee herein and directing that his respondent pay forthwith unto the said Trustee in Bankruptcy the sum of $10,210.00 with six per cent interest thereon, be in all things set aside and that his respondent be granted a rehearing herein and upon such rehearing that this respondent be discharged with its costs for the following reasons, to-wit:

I

The Honorable Referee in this cause and this Honorable Court erred in taking and assuming jurisdiction upon said summary proceedings over the protest of this respondent and its objections thereto because said plea to the jurisdiction of this respondent and the evidence heard before the Referee show that this respondent asserted an adverse claim to the said sum of money paid to the said American National Bank by the Bankrupt in November, 1918, in that long prior to the filing of said petition in bankruptcy and for many years prior thereto the said American National Bank and the Walker Grain [fol. 21] Company had a contract whereby the said Bank advanced moneys to the said Walker Grain Company from time to time to pay bills of lading drawn against said Company with draft attached for grain purchased by said Company; that said lien extended to said grain and the proceeds thereof wherever same were and all substitutes therefor and that the said sum of money was borrowed by the Walker Grain Company from the Bank to pay for such grain and that the proceeds of grain so paid for were paid by the Walker Grain Company to this respondent in payment of said obligation and thereby this respondent had a valid adverse claim to said sum of money, same having been paid to it in the usual course of business by the bankrupt long prior to the adjudication and this respondent has a right to a trial in a Court of competent jurisdiction upon such claim.

II

The Honorable Referee erred and this Honorable Court erred in taking and exercising summary jurisdiction herein and in overruling this respondent's plea to the jurisdiction filed herein because the

same being under oath and setting up facts showing an adverse claim to said sum of money by this respondent and said adverse claim being undisputed by any pleadings filed by this Trustee in reply thereto, the Honorable Referee should have sustained same and this Honorable Court should have reversed the action of the Referee in refusing to sustain same and the said motion against this respondent should have been dismissed for want of jurisdiction.

III

The Honorable Referee erred in holding and this Court erred in sustaining the holding of the said Referee that the note for Ten Thousand Dollars, dated July 27th, 1918, and executed by the Walker Grain Company to the American National Bank was not secured except by Ten Thousand Dollars par value of Liberty Bonds, because the evidence shows that long prior to the filing of the petition in Bankruptcy against the Walker Grain Company and for many years prior thereto the said Walker Grain Company entered [fol. 22] into a contract with said American National Bank whereby it was agreed that the said Walker Grain Company would deposit therein all bills of lading and drafts for grain sold by said Walker Grain Company and all moneys received therefor and substitutes thereof in consideration whereof the said Bank would from time to time advance to said Walker Grain Company sums of money with which to buy grain and pay off drafts attached to bills of lading for grain purchased by said Walker Grain Company and that all such drafts, bills of lading, warehouse certificates and all grain so purchased, as well as all substitutes and proceeds of the same, would and should be held by the said Bank as collateral security for any and all advancements of money made to said Walker Grain Company by the said Bank; that at the date of said note said Bank had in its possession three certain bills of lading for grain as collateral security for the payment of said note and that thereafter bills of lading drawn on purchasers of grain by said Walker Grain Company and drafts evidencing the same were deposited in said Bank, collected through said Bank and the proceeds deposited therein and by reason of the aforesaid contract fixing a lien on said bills of lading, drafts, grain, the proceeds and substitutes therefor, all such proceeds coming into the possession of said Bank would by virtue of said contract be charged as security for said note and said facts having appeared by undisputed, verified pleadings and by undisputed evidence, it is error for the said Referee of this Court to proceed against this respondent in a summary manner without trial and such proceedings should have been dismissed.

IV

The Honorable Referee erred in holding and this Honorable Court erred in sustaining the holding that the payment made to this respondent, or to the said American National Bank, on said Ten Thousand Dollar note were not an offset against the deposit of the Walker Grain Company in said Bank at said time and holding that there

[fol. 23] were no deposits in the account of the Walker Grain Company in said Bank because the undisputed evidence shows that there were deposits in said bank at the time of such payment and that said note was paid in full out of such deposits by check drawn upon said Bank. It therefore clearly appears that the Walker Grain Company was indebted to the Bank in the amount of note and the Bank was indebted to the Walker Grain Company in the amount of the deposit applied to the satisfaction thereof, and being mutual debts, the said Bank had the right to offset same against each other.

V

The Referee erred in holding and this Court erred in sustaining such holding that the said Bank held no lien at the time of said payment because the undisputed evidence shows that all moneys on deposit in said Bank represented the proceeds of grain purchased from the Bankrupt prior to the institution of these proceedings upon which the said Bank held a valid lien, having paid for all such grain itself with money advanced under such agreement.

VI

The Honorable Referee erred in holding and this Honorable Court erred in sustaining such holding that the payments made by the bankrupt and accepted by the Bank constituted a preference to the disadvantage of other creditors because:

(a) The undisputed evidence does not support this finding.

(b) Because the finding is erroneous because the loan under the undisputed evidence was made for a present consideration, secured by a lien on the assets of the Walker Grain Company in the hands of said Bank or coming into said Bank.

(c) The undisputed evidence is that all of the money deposited in said Bank at the time of said payment was proceeds of grain paid for by the Bank on which the Bank held a contract or equitable lien and, in addition thereto, a Banker's lien, and the application of such de-[fol. 24] posit to the payment of said lien was but the exercise of a legal and equitable right by the Bank existing and vested at the time of the petition in bankruptcy was filed.

(d) There is no proof of evidence that the Bank knew at the time such payments were made that the Walker Grain Company was insolvent or that said Bank had reasonable grounds to believe that said Company was insolvent; that said Company was conducting its business in the usual course and continued to do so for more than a year after the said payments were made.

(e) Even if said payment constituted a preference the Court is without jurisdiction to order it repaid in a summary proceeding.

VII

The Honorable Referee erred in holding and this Honorable Court erred in sustaining such holding that he had power and jurisdiction

by motion to summarily direct the return of said money received by the said American National Bank as a preference, the remedy of the said Trustee being a plenary suit in a Court of competent jurisdiction to recover said sum.

VIII

The Honorable Referee erred in holding and this Honorable Court erred in sustaining such holding that the Referee had jurisdiction to summarily order the payment of said money by this respondent because said petition by the Trustee shows upon its face that it is a petition to recover an alleged preference against this respondent and said petition is wholly insufficient in that it is not alleged that there are any claims allowed against said estate, to pay which this recovery is necessary.

X

The Honorable Referee erred in holding and this Honorable Court erred in ssutaining such holding that he had jurisdiction to summarily order this respondent to pay back money owing by the American National Bank, the allegation being that this respondent assumed [fol. 25] the liabilities of the said American National Bank, by contract and said petition being based upon said assumption of such liability that if by virtue of any of said matter this Bank has become liable its liability is purely contractural and therefore cannot be enforced by summary proceedings.

XI

Your Petitioner further shows that said order should not be granted for the reason that although more than three years has expired since the adjudication of the Walker Grain Company, bankrupt, that no claim has been allowed whatever in said estate and that the said Trustee now has no allowed claim in said estate and the only claims ever presented in said estate during said period of time being claims for unliquidated damages for breach of contract for future delivery of grain, that no application has ever been made to the Trustee by any of said claimants to direct the manner of such liquidation; that the facts in all such claims are disputed by the bankrupt and same are now barred by limitation and the latches of said alleged claimants and cannot now be allowed in said estate and therefore the said Trustee has nothing to pay in said estate and no claims therein and therefore cannot maintain an action to recover an alleged preference, all of which this respondent is ready to verify.

Therefore, your respondents respectfully prays that said order be set aside and annulled and that a rehearing be granted herein and upon such hearing that said petition of the Trustee be dismissed and said findings of the referee be overruled and set aside and for such other relief that respondent may show itself entitled to in equity, and it will ever pray.

Cooke, Dedmon & Potter, Attorneys for Respondent.

Jurat showing the foregoing was duly sworn to by Clay Cooke, omitted in printing.

[fol. 26] [File endorsement omitted.]

[fol. 27] [Title omitted]

The Court having considered the motions of the respondents H. L. Walker, Farmers & Mechanics National Bank of Fort Worth, Texas, and Mrs. M. M. Walker for a rehearing upon the order of the Court heretofore entered affirming the orders of the referee, that the said parties be compelled to pay summarily to the trustee herein certain moneys received by them from the bankrupt subsequent to the filing of the petition in bankruptcy herein;

It is hereby ordered that said motions for rehearings be overruled.

James C. Wilson, Judge.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Aug. 14, 1923

To the Hon. James C. Wilson, District Judge of said Court:

The above named defendant, Farmers & Mechanics National Bank, feeling itself aggri-ved by the decree made and entered in this cause on the 18th day of July, A. D. 1923, does hereby appeal from said decree to the Circuit Court of Appeals for the 5th Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that its appeal be allowed and citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orlenans, Louisiana.

And your Petitioner further prays that the proper order touching the security to be required of it to protect its appeal be made.

J. A. Templeton, Clay Cooke, Solicitors.

The above petition is granted and the appeal allowed upon the defendant giving bond conditioned as required by law in the sum of Three Hundred Dollars.

James C. Wilson, District Judge.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Aug. 14, 1923

The defendant, Farmers & Mechanics National Bank, in connection with its appeal and petition to superintend and revise, makes the following assignments of error:

(1) The referee erred in taking summary jurisdiction, because the plaintiff sues herein to recover a voidable preference and such suit can only be maintained in a Court of Bankruptcy or a State Court having jurisdiction thereof, and the referee is without jurisdiction to summarily order the restroation of such preference, there being no allegation that said sum ever came into the possession or custody of the Court, and defendant's objections to the summary jurisdiction of the referee which were seasonably made, should have been sustained.

(2) The referee erred in taking summary jurisdiction for that this petitioner set up by proper plea its objections to the jurisdiction of the Referee, which plea and objections set forth facts from which it appeared that this petitioner asserted an adverse claim to the $10,000.00 paid it by the Bankrupt in November, 1918, in that said plea and objections to the jurisdiction of the Referee set forth that long prior to the filing of the petition in bankruptcy, it entered into an agreement with the Walker Grain Company, whereby it was agreed and understood between petitioner and the Walker Grain Company that for all moneys advanced the Walker Grain Company by the petitioner, it would hold all bills of lading and drafts, *and drafts*, and [fol. 30] proceeds and substitutes for the same as collateral security for any and all advancements of money made or that might be made Walker Grain Company by petitioner, and it appearing that the payment of said note was out of moneys, the proceeds of drafts and bills of lading for grain deposited in and collected through your petitioner the Farmers & Mechanics National Bank.

(3) The Honorable Referee erred in taking summary jurisdiction herein, and is overruling the plea to the jurisdiction filed by this petitioner because the same being under oath and setting up facts showing an adverse claim and it being undisputed by any pleading filed by the Trustee in reply thereto, the Honorable Referee should have sustained the same, and dismissed said motion as against this petitioner for want of jurisdiction.

(4) The Honorable Referee erred in holding that the note for $10,000.00 dated July 27th, 1918, executed by the Walker Grain Company to your petitioner, the Farmers & Mechanics National Bank, and particularly described in the order attached hereto, was in no manner secured except by $10,000.00 par value of Liberty Bonds registered in the name of J. L. Walker, for that the evidence showed that long prior to the filing of the petition in bankruptcy the Walker Grain Company made and entered into a contract with

the said Bank, or its predecessor, The American National Bank, whereby it was agreed that the said Walker Grain Company would deposit therein bills of lading and drafts for grain sold by the said Walker Grain Company, in consideration whereof the said Bank would, from time to time, advance to said Walker Grain Company sums of money with which to buy grain and that in consideration of such advancements for grain, bills of lading and drafts so received and deposited by the Walker Grain Company, so well as all substitutes and proceeds of the same, would and should be held by the said Bank as collateral security for any and all advancements of money made to said Walker Grain Company by the said Bank, which said agreement was on the 27th day of July, 1918, the date [fol. 31] of said note, in full force and effect; and it further appeared from the testimony that on the date of said —, said Bank had in its possession three certain bills of lading and drafts, which under the agreement aforesaid, were held by said Bank as collateral security for the payment of said note; and it further appeared that Walker Grain Company ceased to purchase grain on or prior to June, 1918, and thereafter all bills of lading, drawn on purchasers of grain by the said Walker Grain Company and drafts evidencing the same were deposited in said Bank, collected through said Bank and the proceeds deposited therein, and by reason of the aforesaid contract fixing a lien on said bills of lading, drafts, proceeds and substitutes therefor, all such proceeds coming into the possession of said Bank were charged by virtue of the security of the aforesaid promissory note. These facts appearing the Honorable Referee erred therefore in overruling your petitioner's objections to the jurisdiction of the Referee to proceed herein by motion and to direct this petitioner in such summary proceeding to pay over to said Trustee said sum of money.

(5) The Referee erred in holding that the payments made on said $10,000.00 note "were not an offset against the deposits of the Walker Grain Company in said Bank as at said time there were no deposits to the account of the Walker Grain Company in said Bank", for that the evidence shows that there were deposits in said Bank at the time of such payments, and that said note was paid in full out of such deposits. It therefore clearly appears the Walker Grain Company was indebted to the Bank in the amount of the note and the Bank was indebted to the Walker Grain Company in the amount of the deposits applied to the satisfaction of said note.

(6) The referee erred in finding that the Bank held no lien at the time of said payments, because all the moneys on deposit represented the proceeds of grain purchased from the Bankrupt long prior to the institution of these proceedings, all of which were paid for by the Bank and on which the said Bank had a lien for all advancements made.

[fol. 32] (7) The Referee erred in holding that such payments were made by the Bankrupt and accepted by the Bank with intention to pay and accept a preference to the disadvantage of other creditors:

(a) Because the evidence does not support this finding;

(b) Because the finding is further erroneous for the loan when made was for a present consideration secured by a lien on the assets of the Walker Grain Company in the hands of the Bank, or coming into the Bank. The payment of the loan, therefore, did not and could not operate legally to the disadvantage or detriment of other creditors within the intent and meaning of the Bankruptcy Act defining preferences;

(c) The undisputed evidence is that all of the money deposited in the Bank at the time of such payments were proceeds from grain paid for by the Bank, on which the Bank held a contract or an equitable lien and in addition a banker's lien, and the application of such deposits to the payment of said loan was but the exercise of a legal or equitable right of the Bank existing and vested at the time the petition in bankruptcy was filed.

(d) There is no proof or sufficient evidence that the Bank knew at the time such payments were made that the Walker Grain Company was insolvent, nor that said Bank has reasonable grounds to believe that said Walker Grain Company was insolvent.

(8) The Referee erred in holding that the Referee had power and jurisdiction by motion to summarily direct the return of the money received by a creditor as a preference, there being in such case no other remedy of the Trustee than a plenary suit in a Court of competent jurisdiction, the loan or payment of the loan in question being classed as a preference and sought to be recovered as such by a motion and so found by the Referee.

(9) It being undisputed that said note was secured by Liberty Bonds the title of which is claimed by the Trustee, as property be- [fol. 33] longing to the Walker Grain Company, the American National Bank, is entitled to a trial in a Court of competent jurisdiction with power and authority to reinstate such security and place the defendant in the same situation as it would have occupied had said note not been paid, and its rights to subrogation to the claim of the trustee upon said liberty bonds can not legally be disposed of in a summary manner by the Referee.

(10) The bankrupt at the time of said payments was continuing in its business regularly depositing and checking out funds in the defendant bank long prior to adjudication, operating under good and sufficient bonds filed in and approved by this Court, upon which the Trustee is seeking to recover this same identical sum paid defendant, and said sums were paid to defendant out of such checking account, which if they had remained in said bank until the adjudication could have been offset by defendant against said note, and the referee can not dispose of defendant's right and claim thereto summarily.

Wherefore, the defendant prays that the judgment and decree of the District Court and the Referee, may be reversed.

J. A. Templeton, Clay Cook, W. E. Spell, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

MANDATE—Filed March 28, 1924

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Northern District of Texas, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Texas, before you in the matter of Walker Grain Company, bankrupt, No. 1001 in Bankruptcy, wherein the decree of the said District Court, entered in said cause on the 20th day of November, A. D. 1922, was in favor of W. W. Wilkinson, Trustee of Estate of said bankrupt, and against petitioner, Farmers & Mechanics National Bank, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of a petition to superintend and revise, and appeal sued out by Farmers & Mechanics National Bank, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of November, in the year of our Lord one thousand nine hundred and twenty-three, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the appeal in this cause be, and the same is hereby, dismissed, and that the said petition to superintend and revise the proceedings aforesaid, be, and the same is hereby, denied;

It is further ordered, adjudged and decreed that the appellant and petitioner Farmers & Mechanics National Bank, and the sureties on the appeal bond herein, J. L. Walker and W. L. Carr, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

December 4th, 1923.

[fol. 35] You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said petition to superintend and revise, and appeal, notwithstanding.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the Twenty-sixth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF REFEREE IN BANKRUPTCY—Filed April 22, 1924

I, Glenn Smith, Referee in Bankruptcy, before whom the above styled and numbered cause is pending, hereby certify to your Honor the following:

That on the 29th day of March, A. D. 1921, W. W. Wilkinson, Trustee of said estate, filed a Motion before me to require the Farmers & Mechanics National Bank, Fort Worth, Texas, to show cause why a summary Order should not be made against it requiring the said Bank to pay unto the said Trustee the sums of Sixteen Hundred Fifty Dollars ($1,650.00) with interest at the rate of six per cent per annum from October 11th, 1918, and Eighty-five Hundred Sixty Dollars ($8,560.00) with interest thereon at the rate of six per cent per annum from November 2, 1918, which had been received by the said Bank subsequent to the filing of the petition in Bankruptcy.

Upon the filing of the said Motion I caused to be issued and served upon said Bank a notice to appear before me on the 7th day of April, A. D. 1921, to show cause why the relief prayed for by the Trustee should not be granted and the said sums of money paid to the Trustee.

Thereafter, on the 7th day of April A. D. 1921, the said Bank filed its answer before me, first contesting the jurisdiction of the Referee to enter summary Order in said proceeding, and, second, answering to the merits of said Motion and setting up alleged reasons [fol. 37] why said summary Order should not be made.

After a full hearing of the evidence on said matters tendered by the Trustee and by the said respondent, I, on the 2d day of June, A. D. 1921, entered an order requiring the said respondent immediately to pay the said Trustee the following sums of money, to wit: Sixteen Hundred Fifty Dollars ($1,650.00) with interest thereon at the rate of six per cent per annum from October 11th, 1918, and Eighty-five Hundred Sixty Dollars ($8,560.00) with interest thereon at the rate of six per cent per annum from November 2d, 1918.

A petition for review of said Order was taken to the District Court and was affirmed by said Court; and afterwards the Order of said Court was affirmed by the U. S. Circuit Court of Appeals. Thereafter, I am informed, that a petition for certiorari was sued out by the respondent and was denied by the United States Supreme Court, and the mandate of the said U. S. Circuit Court of Appeals has been returned to the Clerk of the said District Court and has by the Clerk of said District Court been certified to me.

After the certification of said mandate to me, and on to wit, the 17th day of April, A. D. 1924, I caused to be issued and served on the said respondent a notice to comply with said summary Order on or before Monday, April 21, 1924, and that in the event of failure

to so comply that I would certify such fact to your Honor for such action as your Honor might deem appropriate.

The said Trustee has filed before me a sworn statement to the effect that the said Bank has failed to pay to him within the time stated the said sums of money or any part thereof.

Wherefore, I certify that the said Farmers & Mechanics National Bank has not paid said sums of money or any part thereof, and has failed and refused to comply with said Order.

[fol. 38] The said Farmers & Mechanics National Bank has, however, filed before me a pleading which it designates as Answer and Petition of the Farmers & Mechanics National Bank to Notice of Contempt Proceeding. I have considered the said pleading and find that it contains no valid reason, excuse or defence for the failure of the said Bank to comply with the said Order. My finding and conclusion in this respect is made without the introduction of testimony and without argument of counsel which were requested by the said Bank.

Wherefore, I respectfully certify to your Honor that the said Farmers & Mechanics National Bank and its officers and directors should be cited to show cause why said Bank and its officers and directors are not in contempt of Court for refusing to comply with said Order as aforesaid.

Respectfully submitted this 22d day of April, A. D. 1924.

(Signed) Glenn Smith, Referee in Bankruptcy.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION THAT RESPONDENTS BE ADJUDGED IN CONTEMPT

To Honorable William H. Atwell, judge presiding in said cause:

Now comes W. W. Wilkinson, Trustee in Bankruptcy of the Walker Grain Co. Bankrupt, and respectfully shows to your Honor, the following, to-wit:

That heretofore on the 2nd day of June, 1921, the Referee in Bankruptcy in this cause, after due application of your petitioner Trustee, and after due notice and hearing to Farmers & Mechanics National Bank, a national banking corporation of which J. T. Pemberton is President, and Elmer Renfro, cashier, respondent herein, entered an order in the above styled bankruptcy proceeding then pending in this Court and before said Referee, directing respondent to pay summarily unto your petitioner Trustee, the following sums of money with interest at the rate of six per cent cent per annum from the following dates, to-wit:

One Thousand Six Hundred Fifty Dollars ($1,650.00) with interest thereon at the rate of six per cent per annum from October 11th, 1918; and,

Eight Thousand Five Hundred Sixty Dollars ($8,560.00) with interest thereon at the rate of six per cent per annum from November 2nd, 1918;

[fol. 40] That thereafter, the matter of said summary order having been removed by said respondent to the United States District Court for the Northern District of Texas, Forth Worth Division, by a petition to review said order, the said District Court on the 21st day of November, 1922, approved and affirmed said order of said referee and ordered the said respondent to pay forthwith unto your petitioner Trustee the aforesaid sums of money with interest at the rate of six per cent per annum from the dates aforesaid.

That thereafter, an appeal and a petition to superintend and revise the order of said District Court were taken by said respondent to the United States Circuit Court of Appeals for the Fifth Circuit, and after due hearing said appeal was dismissed, and said petition to superintend and revice on the merits was by said Court denied. That thereafter, the said respondent sued out a petition for certiorari to the United States Supreme Court, which was by said Court denied. That thereafter, the mandate of said Circuit Court of Appeals was returned to said District Court, and was by the Clerk of said District Court certified to said Referee in Bankruptcy.

That thereafter, on the 17th day of April, 1924, the said referee in Bankruptcy notified the said respondent in writing, the said notice being served upon said respondent by the United States Marshal for the Northern District of Texas, to comply with said summary order on or before the 21st day of April, 1924.

That the time given in said last named order has expired and the said respondent bank, acting through the said Pemberton, President, and said Elmer Renfro, Cashier, has failed and refused to comply with said order in any manner.

[fol. 41] That the said Referee in Bankruptcy has certified to your Honor the fact that said respondent has refused to comply with said order, for the purpose of having your Honor issue an order to respondent to show cause, if any, why said respondent should not be adjudged in contempt of Court for refusing to obey said order, and said certificate of said Referee has been duly filed with the Clerk of this Court.

Your petitioner Trustee says that the aforesaid order is a valid, subsisting order of this Court and of said Referee, and has not been complied with, and that said respondent is in all things able to comply with said order; but willfully, contumaciously and flagrantly and without legal excuse, refused to comply with the same.

Wherefore, your petitioner prays that this Honorable Court enter a rule against respondent bank and its said President, J. T. Pemberton, and said cashier, Elmer Renfro, fixing a day certain for respondents to appear and show cause, if any, why respondents

should not be adjudged in contempt of Court for failing and refusing to comply with said order, as aforesaid.

Respectfully submitted, Geo. M. Conner, Capps, Cantey, Hanger & Short, Boykin & Ray.

[fol. 42] (Copy)

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed April 23, 1924

To Farmers & Mechanics National Bank of Fort Worth, Texas, and J. T. Pemberton, its president, and Elmer Renfro, its cashier, respondents to a motion filed by the trustee in bankruptcy in the above cause and to a certificate of the referee in bankruptcy filed in this court, copies of which are hereto attached:

You are hereby commanded to appear on the 3rd day of May, 1924, before the District Court for the Northern District of Texas, Judge William H. Atwell, presiding, in the city of Dallas, at the hour of 10 A. M., to show cause, if any, why you, one of the respondents in said motion, should not be adjudged in contempt of court for refusing to obey the order of the Referee in Bankruptcy and of this Court, as described and set forth in the petition of said Trustee in Bankruptcy and the certificate of said Referee in Bankruptcy hereto attached.

(Signed) Wm. H. Atwell, Judge.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 2, 1924

To the Honorable Wm. H. Atwell, Judge of said Court:

Now comes the Farmers & Mechanics National Bank, of Fort Worth, Texas, and in response to the rule herein issued requiring it to show cause why it should not be adjudged in contempt of Court for failure to pay to the complainant the sums of money in said complaint specified, respectfully shows unto your Honor:

1

Your respondent respectfully shows that this Honorable Court is without jurisdiction to compel respondent by contempt proceedings

to pay to the complainant a common law debt, claimed to be owing by the American National Bank which is the purpose and effect of the complainant herein.

2

Respondent respectfully shows that this Honorable Court is without jurisdiction herein to compel by contempt proceedings the payment of said alleged indebtedness of the American National Bank, to the complainant, and said order is not a lawful order and *and* is void as against your respondent, for the reasons hereinafter set forth as follows, to-wit:

(a) The said Referee and the said U. S. District Court, sitting as a Court of Bankruptcy, are without any jurisdiction by summary order and criminal process to take from respondent said sum of money without a trial in a Court of competent jurisdiction as required by law, and said order is in excess of said Court's jurisdiction and is void.

[fol. 44] (b) That said order and the attempt of the complainant to enforce same by criminal process and to take from respondent said sum of money without trial is in violation of the Constitution of the United States, in that said proceedings is an attempt without due process of law to deprive respondent of its property, of which it is in possession in that said order is a summary order issued without trial according to the due course of the law, and its enforcement by criminal process as attempted by the complainant is in violation of respondent's rights to due process of law in defense of its property as guaranteed by the Fifth Amendment to the Constitution of the United States.

(c) That said order and the attempted enforcement thereof by criminal process against respondent is in violation of Article VII of the Amendments to the Constitution of the United States preserving to respondent its right to a jury trial in all actions at Common Law, your respondent's possession of and claim to its own money being an adverse title and claim thereto, and said complainant's action to recover same, as shown by his petition aforesaid being an action of debt at common law, and by reason thereof said order is void.

(d) Said proceedings violate both the Constitutions of Texas, and the United States, and are beyond any lawful authority or jurisdiction ever conferred upon this Honorable Court.

3

Respondent excepts to the notice certificate and complaint filed herein and says that same is vague, indefinite and uncertain and does not apprise respondent of the facts relied upon as constituting the contempt, nor does same set up facts sufficient to show a con-

tempt, nor to show jurisdiction in this Honorable Court thereof, nor does same contain any of the pleadings or proceedings had.

[fol. 45]

4

Respondent says that said proceedings fail to apprise respondent or the court of the date, terms or conditions of said alleged order, nor by what jurisdiction or authority same was made.

5

Your respondent excepts to said complaint because same is not signed or verified as required by law.

6

Respondent denies the allegations of said certificate and complaint and says that same are not true, except as hereinafter set forth.

7

Without waiving the insufficiency of said complaint, but insisting on same respondent respectfully shows.

That heretofore, on the 27th day of July, 1918, the Walker Grain Company was indebted to the American National Bank, in the sum of $10,000.00, as evidenced by its promissory note bearing said date, payable to the order of said American National Bank, in said sum, which said note was at said time secured by $75,000.00 of Liberty Bonds, in possession of said American National Bank, and also by bills of lading covering grain indorsed to and held by said American National Bank, and by $45,000.00 in money deposited in said Bank, in the name of J. L. Walker, Trustee, for the use and benefit of said bank, a true copy of which said note is hereto attached and made a part hereof, and marked Exhibit "A"; that said securities were deposited with said bank more than 18 months prior to the filing of the petition in bankruptcy, to secure said bank in all indebtedness of the bankrupt to it, past, present, and future.

8

That thereafter on August 16, 1918, a petition for the adjudication of Walker Grain Company, a bankrupt was filed in the U. S. District Court for the Northern District of Texas, at Forth Worth, and ap-
[fol. 46] plication made for the appointment of a receiver of said Walker Grain Company. That on October 7th, 1918, a receiver of said company was appointed by the Referee, who, however, entered an order providing that the said bankrupt might execute and file a bond in the sum of $25,000.00 and supersede said order pending petition for review, which said bond with J. L. Walker and R. L. James, as sureties was duly filed and approved and said bankrupt retained possession, custody and control of its said property pending

the adjudication in bankruptcy; that said order appointing said receiver was affirmed by the District Court on the 26th day of Nov. 1918, which decree the said bankrupt petitioned the Circuit Court of Appeals for the Fifth Circuit to revise, and said Circuit Court of Appeals upon the filing of same entered the following order:

"Upon hearing the foregoing petition, it is ordered that upon the execution of a bond in the sum of Forty Thousand ($40,000.00) Dollars, payable to the petitioning creditors, as per form hereto attached, that all further proceedings under the order of the Honorable District Judge of the United States for the Northern District of Texas, sustaining or affirming the order of the Referee, W. B. Paddock, Esq., appointing a receiver of the assets of the Walker Grain Company be superseded and stayed.

And it is further ordered that said receiver shall restore to the possession of said Walker Grain Company, and *and* all property and assets and other things which have come into his possession by virtue of said appointment."

which said bond, with the Massachusetts Bonding Company, as surety, was filed and approved and said bankrupt continued in the management, custody and control of its property and assets until the adjudication in bankruptcy on or about Nov. 20th, 1920, and appointment and qualification of said Trustee on or about February 19th, 1921.

9

That in the usual course of business of the Walker Grain Company, with the American National Bank, the said Walker Grain Company, on October 9th, 1918, paid to the American National Bank [fol. 47] by its check drawn on its checking account in the American National Bank, the sum of $1,650.00, upon said indebtedness, and in like manner on Nov. 2nd, 1918, paid to the American National Bank $8,650.00, upon said indebtedness, whereupon said American National Bank, surrendered to J. L. Walker, President and Manager of said Walker Grain Company, the aforesaid collateral held by it and satisfied said indebtedness; that at said time respondent was in no manner connected with said American National Bank and respondent never at said time or since received any portion of said moneys.

That thereafter on or about November 20th, 1920, the said Walker Grain Company, was duly adjudged bankrupt, and said estate referred to Glenn Smith, Esq., Referee, for administration, who thereafter appointed the defendant as Trustee thereof as aforesaid.

10

That thereafter March 27th, 1921, said defendant W. W. Wilkinson, filed with said Glenn Smith, Referee, his petition alleging as follows:

"That on or about the 1st day of January, 1919, the said Farmers & Mechanics National Bank, of Fort Worth, Texas, consolidated

with and succeeded the American National Bank, of Fort Worth, Texas, such consolidation and succession being effected under the law of the United States in such cases made and provided and under such laws the said Farmers & Mechanics National Bank assumed and became bound and liable to pay all the liabilities of the said American National Bank, and the said Farmers & Mechanics National Bank, also by express agreement with said American National Bank, agreed to pay all outstanding liabilities of said bank at the time of such consolidation and succession.

Your petitioner would show that the petition in bankruptcy upon which the said Walker Grain Company was finally adjudicated a bankrupt, was filed on the 16th day of August, 1918, and that the said American National Bank, which was then in business, and actual notice of the filing of such petition upon the day that the same was filed or in all events upon the next day, after the filing of same.

That on July 27th, 1918, at a time when the said Walker Grain Company was hopelessly insolvent and owed a large amount of debts and suits for receivership and other suits pending against it, the said American National Bank, with full knowledge of such insolvent condition of said Walker Grain Company, made a loan to the said Walker Grain Company, of the sum of $10,000.00, which said loan was made for the purpose of paying and taking up an overdraft in the account of the said Walker Grain Company, with said bank. That in consideration of said loan, the said Walker Grain Company made, executed and delivered to said bank, its promissory note of said date in the sum of $10,000.00, payable on demand, with interest from date until paid at the rate of — per cent per annum.

[fol. 48] Thereafter on or about the 9th day of October, 1918 the Walker Grain Company, paid upon its said obligation the sum of $1,650.00 and thereafter on or about the 2nd day of November, 1918, said Walker Grain Company paid to said American National Bank, upon said obligation the further sum of $8,560.00. That said sums of money were paid to said bank with the intention both upon the part of the Walker Grain Company, and said Bank to pay and accept said sums of money as a preference upon said obligation over and above amounts going to other creditors and with an intent to hinder, delay or defraud and defeat the other creditors of the said Walker Grain Company, and that the payments of said money was a detriment to and disadvantage to the other creditors of the said Walker Grain Company, who hold provable claims against the said Company, to the extent of approximately $150,000.00."

11

Your respondent was not in any sense a party to said bankrupt proceedings, but was ordered on March 30th, 1921, by said Referee to show cause why it should not be summarily ordered to pay over said sums of money, and on April 7th, 1921, appeared solely for the purpose of objecting to the jurisdiction of the said Referee setting up its aforesaid adverse claims to its own moneys.

That thereafter the said Referee, upon information obtained at the general examination of the bankrupt theretofore held prior to the filing of said petition by the Trustee and prior to the notice to respondent and without passing upon your respondent's plea to the jurisdiction aforesaid and without trial or notice to respondent and without giving respondent its day in Court or notice of any hearing, and without any hearing entered the following order:

"I find that on July 27th, 1918, the Walker Grain Company executed and delivered to the respondent Farmers and Mechanics National Bank, Forth Worth, Texas, its promissory note in the sum of Ten Thousand Dollars ($10,000.00) payable on demand, and that the said bank on said date, advanced to the said Walker Grain Company, said amount of money. That said note was in no manner secured except by Ten Thousand Dollars ($10,000.00) par value of Liberty Bonds registered in the name of J. L. Walker and claimed by the said J. L. Walker, to be his individual property, I find that there was paid on said note by the bankrupt on Oct. 11, 1918, the sum of One Thousand Six Hundred and Fifty Dollars ($1,650.00) and on Nov. 2nd, 1918, the sum of Eight Thousand Five Hundred and Sixty Dollars ($8,560.00) and that such payments were not an offset against any deposits of the Walker Grain Company, in said bank, as at said time there were no deposits to the account of the said Walker Grain Company in said Bank. That at the time of said payments the bank held no character of lien or security except the Liberty Bonds as aforesaid, claimed under oath by the said J. L. Walker, to be his individual property, I find that the said Farmers & Mechanics National Bank, of Fort Worth, is the successor of the American National Bank, of Fort Worth, Texas, and as such should be legally held for the liabilities of the said American National [fol. 49] Bank. I find that before and at the time of said payments, the said bank had actual notice of the filing of the petition in bankruptcy, and that the said payments were made by said bankrupt, and accepted by said bank with the intention to pay and to accept a preference to the disadvantage of other creditors of the Walker Grain Company. I find that said bank is financially able to respond to a summary order for the restoration of said moneys with interest."

"I conclude that the Farmers & Mechanics National Bank, of Fort Worth, Texas, had no right or color of right to the sums of money paid to it as aforesaid, and must, therefore, pay to the Trustee, the said sums of money with interest at the rate of 6% per annum from the dates of said payments."

"That the Farmers & Mechanics National Bank, of Fort Worth, Texas, pay to the said Trustee, W. W. Wilkinson, Esq., the sums named hereinabove as having been paid to said bank after the filing of the petition in bankruptcy, aggregating Ten Thousand Two Hundred and Ten Dollars ($10,210.00), together with interest at the rate of 6% from the dates of the said payments."

13

Said findings were based solely on the hearing of the general examination of the bankrupt, without notice to respondent and held and conducted in respondent's absence and long prior to the petition filed by complainant against respondent.

14

Respondent further shows that after procuring the aforesaid order from the said Referee, the said W. W. Wilkinson, Trustee, on June 16th, 1921, filed suit in the U. S. District Court to recover of said J. L. Walker, President of said Bankrupt the said Liberty Bonds and said Trustee account aforesaid held by said Bank as security for said debt, which said Liberty Bonds had been in possession of the American National Bank, since July, 1917, as part of a trust account of $120,000.00 known as the "Trustee Account" as security for any indebtedness of the bankrupt to the said bank, and on or about December 5th, 1923, caused this Honorable Court upon said claim to enter a decree adjudging title to said bonds or the proceeds thereof in said Trustee, and this Court entered a decree adjudging such title to the extent of $51,500.00 in said Trustee, less $32,500.00 thereof legitimately paid out of such fund by said bankrupt a true copy of said petition of said Trustee is hereto attached and made a part hereto as "Exhibit B" and reference is hereby made to the opinion and decree of this Honorable Court in cause No. 266 Equity, and the evidence therein.

[fol. 50]

15

That after procuring said order from said Referee, aforesaid, the said W. W. Wilkinson, on the 15th day of July, 1921, in cause No. 985 at Law, in this Honorable Court filed his suit against the said surety J. L. Walker upon the bond aforesaid to recover the sum of $37,027.31, being all the moneys paid out by the said bankrupt since the filing of the petition in bankruptcy and including the said sums paid to the American National Bank as aforesaid; and on the same date filed in this Honorable Court his suit against the Massachusetts Bonding Company, in cause No. 986 at Law, seeking to recover of such surety the sum of $37,027.31, being all the money paid out by said bankrupt since the filing of said petition in bankruptcy and including therein the sums paid as aforesaid to the American National Bank, reference to the petitions in said causes Nos. 985 and 986 aforesaid, being hereby made, and said proceedings being made a part thereof.

16

Your respondent respectfully shows that the aforesaid decree in said cause No. 266 Equity has been appealed by the said J. L. Walker and good and sufficient supersedeas bond in the sum of $27,000.00

given payable to complainant that said causes Nos. 985 and 986 at Law aforesaid have been tried and judgment rendered therein by this Honorable Court against said bondsmen for the identical sums ordered paid by your respondent, and said Trustee is precluded thereby and cannot obtain double satisfaction for the same moneys in the same Court, nor can he collect by the equity powers of the Court and by criminal process moneys, for the payment of which he has and has availed himself of a full, complete and adequate remedy at law.

17

Your respondent further shows that said summary order of said Referee is void and should not be enforced against your respondent because said order was obtained by fraud upon the Court and in [fol. 51] violation of law in that: Respondent is informed, and thereupon alleges:

(a) The said W. W. Wilkinson, Trustee, employed as his attorney, one F. P. Culver, Jr. to procure said summary order of the Referee, that said F. P. Culver, Jr. represented said complainant in all proceedings before said Glenn Smith, Referee, and in said District Court; that during all of said time said F. P. Culver, and the said Glenn Smith, were general law partners, the said Referee received and was entitled to receive a share in all fees or compensation earned by said Culver, and said Culver being entitled to receive a share in all fees earned by said Referee; that at the time said Referee entered said summary order aforesaid against your respondent, said Referee was financially interested in said matter in that said Culver expected to receive a portion of said moneys as compensation, which said sums he was obligated to divide with his said law partner, Glenn Smith, and plaintiff is informed and avers that at the time said Referee entered said order he was entitled to receive and expected to receive a part of said recovery; that the said order of said referee in which he was financially interested, is void and he was without jurisdiction to enter same under the provisions of the bankrupt law.

18

Respondent is informed and thereupon alleges, that said financial interest of said Referee in said matter was fraudulently concealed from respondent, and was unknown to respondent until after all the proceedings herein alleged had been had, and respondent avers on information and belief that said Trustee knowingly and purposely employed the said law partner of said Referee to represent him before said Referee, for the purpose of obtaining an unfair and inequitable advantage over respondent in said proceedings.

(b) That the said Trustee in obtaining said order from the Referee contended and represented that said note so paid to the American National Bank, was an unsecured indebtedness, except as to the Liberty Bonds described as collateral, and which belonged

[fol. 52] to said J. L. Walker, and caused said Referee to make the following finding of fact therein, to-wit:

"That said note was in no manner secured except by Ten Thousand Dollars ($10,000.00) par value of Liberty Bonds, registered in the name of J. L. Walker, and claimed by the said J. L. Walker, to be his individual property."

That having procured said order upon such representations and findings said complainant thru said Culver, attorney for said Wilkinson, and law partner of said Smith, fraudulently and contrary to said findings laid claim to said Liberty Bonds and said Trustee account as property of said bankrupt estate and immediately filed a plenary suit against said J. L. Walker, No. 266 Equity aforesaid, claiming said bonds as property of the bankrupt and procured from this Court a decree therefor. Respondent shows that The American National Bank surrendered possession of said bonds and said Trustee Account upon the payment of said note for $10,000.00; that it had held said bonds as collateral for any indebtedness of the bankrupt for more than a year prior to the filing of the petition in bankruptcy, and is entitled in equity, if said bonds are finally held to be the property of said bankrupt in said cause No. 266 Equity, to have The American National Bank's status quo restored and said bonds or the proceeds thereof and said Trustee Account returned by said Trustee to it as collateral security for said note: That said decree in said cause No. 266 Equity for $19,000.00 represents the proceeds of said Liberty Bonds so held by The American National Bank as security for said note, and were surrendered by The American National Bank upon the payment of said note.

(c) That said Trustee in procuring said summary order on the representation that said collateral Liberty Bonds and Trustee Account held by The American National Bank was not collateral belonging to the bankrupt, and the said Referee in finding such fact and basing his order thereon, and in immediately thereafter filing said cause No. 266 Equity, by the said Culver, claiming title to said identical bonds and Trustee Account as property of the bankrupt, and inducing this Court to find such title in the bankrupt in said cause and grant said complainant recovery thereof practiced a fraud in law, upon the Court of Bankruptcy, and induced said [fol. 53] Court to make two contrary and inconsistent findings of fact on the same issue, in that to get said summary order against your respondent said complainant represented that said bonds and said Trustee Account belonged to said Walker, and upon such finding procured said summary order; and then immediately thereafter in said 266 Equity claimed said bonds and Trustee Account as property of said bankrupt estate and procured a finding of said Court that they did belong to said bankrupt, and a decree therefor to the extent of $51,500.00 thereof: and thereby this Court has entered in said causes two inconsistent and contrary findings as to the title to the same Liberty Bonds, and two inconsistent decrees thereon.

19

Your respondent respectfully shows that to permit said complainant to enforce said summary order by criminal process against it and to recover in said cause No. 266 Equity said bonds and Trustee Account admittedly held by The American National Bank of the creation of said indebtedness and long prior thereto, as collateral to said bankrupt's indebtedness would be a fraud in law upon respondent, and would permit said Trustee to recover said money and at the same time retain said collateral belonging to The American National Bank.

20

That said Referee acting at the instance of and in conjunction with his said law partner Culver, and W. W. Wilkinson, Trustee, wrote up, approved and caused to be filed in said cause, as a basis for said summary order false findings of fact therein as follows to-wit:

(a) The hearing just concluded before me, after due notice to all parties interested as required by law, was of a comprehensive character, as it involved a general examination of the affairs of the bankrupt, and also three motions for the restoration of certain sums of money by summary order, one against J. L. Walker, president of the bankrupt corporation, one against Mrs. M. M. Walker, the wife of J. L. Walker, and Secretary and Treasurer of the bankrupt corporation, and one against the Farmers & Mechanics [fol. 54] National Bank of Fort Worth, Texas, the successor of the American National Bank, of Fort Worth, Texas, and since the evidence upon the general examination of the bankrupt and upon the three motions was all included in one hearing, and as the same counsel represented all of the respondents, and no severance of the motions was requested, the findings, conclusions and orders as they appear hereinbelow cover all three of the said motions."

That said finding is false and untrue; that no hearing was ever had on said motion against respondent, but said general examination of the bankrupt was held prior to the filing of said petition by the Trustee, without any notice to respondent and after the filing of said petition and isserance of said notice the said Referee stated in the record that said hearing was merely the general examination of the bankrupt, and your respondent had no notice or opportunity to be heard on said motion and no knowledge that same was being tried; and practically all of said evidence was heard by said Referee before respondent was ever ruled to show cause, and after filing of respondent's plea to the jurisdiction of the said Referee, no action thereon was ever had and no hearing on the merits was ever held by said referee, but he filed said findings based upon the general examination of the bankrupt held by him prior to the issuance of any notice to respondent.

(b) "I find that on July 27, 1918, the Walker Grain Company, executed and delivered to the respondent, Farmers & Mechanics National Bank, Fort Worth, Texas, its promissory note in the sum of Ten Thousand Dollars ($10,000.00) payable on demand, and that the said bankrupt on said date, advanced to the said Walker Grain Company, said amount of money. That said note was in no manner secured except by Ten Thousand Dollars ($10,000.00) par value Liberty Bonds registered in the name of J. L. Walker, and claimed by the said J. L. Walker, to be his individual property. I find that there was paid on said note by the bankrupt on Oct. 11, 1918, the sum of One Thousand Six Hundred and Fifty Dollars ($1,650.00) and on Nov. 2, 1918, the sum of Eight Thousand Five Hundred and Sixty Dollars ($8,560.00) and that such payments were not an offset against any deposits of the Walker Grain Company in said bank, as at said time there were no deposits to the account of the said Walker Grain Company in said bank."

That said finding is false and untrue, that your respondent never loaned any money to said bankrupt and never had any business dealings with said bankrupt, either prior to or after the filing of said petition in bankruptcy; that respondent never received any payments from said bankrupt at any time, that said sums were never paid to or received by respondent, and said findings are false in toto.

[fol. 55] (c) "That said note was in no manner secured except by Ten Thousand Dollars ($10,000.00) par value of Liberty Bonds, registered in the name of J. L. Walker, and claimed by the said J. L. Walker, to be his individual property."

That said finding of fact is false and was known by said complainant to be false, in that said note showed on its face to be secured by $75,000.00 Liberty Bonds, and in addition was secured by $45,000.00 of money in said Trustee Account held by your said American National Bank, as security therefor, all of which facts were well known to complainant. In addition thereto said note was secured by $6,600.00 worth of bills of lading on grain paid for with said $10,000.00, loan and which were held by said bank indorsed to it and held by it prior to the filing of said petition in bankruptcy as security therefor. That said defendants knew said finding of fact was false, and same was made for the purpose of defrauding respondent out of its said securities:

(d) Said complainant thru said means wrote up and caused said Referee, to make the following finding of fact:

"I find that there was paid on said note by the bankrupt on Oct. 11, 1918, the sum of One Thousand Six Hundred and Fifty Dollars ($1,650.00) and on Nov. 2nd, 1918, the sum of Eight Thousand Five Hundred and Sixty Dollars ($8,560.00) and that such payments were not an offset against any deposits of the Walker Grain Company in said Bank, as at said time there were no deposits to the account of the said Walker Grain Company, in said bank."

That said finding of fact was false and fraudulent and known by said complainant to be false at said time in that each of said payments were mde to the American National Bank, and never came into possession of Respondent and was by check of said bankrupt drawn by it, payable to said American National Bank, against deposits in its checking account in said bank, deposited in the usual course of business, and paid out of same.

(e) Said complainant caused to be made the following finding of fact therein:

"That at the time of said payments the bank held no character of lein or security except the Liberty bonds aforesaid, claimed under oath by the said J. L. Walker, to be his individual property."

which said finding of fact was and is false and fraudulent, and made for the purpose of carrying out said fraudulent purposes aforesaid. [fol. 56] in that said note showed on its face to be secured by $75,000.00 of Liberty Bonds, which said Wilkinson, and his said Attorney Culver, then and there claimed as property of said bankrupt, and was further secured by $45,000.00 of money in said Trustee Account which said defendants then and there claimed as property of said bankrupt, which said claims at said time were unknown to respondent and said Trustee, then and there intended after procuring such order on such false and fraudulent findings of -act. did lay claim in this Honorable Court to all such collateral and thereafter did lay claim thereto in this Honorable Court and caused this Honorable Court to make in said cause No. 266 a contrary finding of fact as to the ownership of said collateral, which said acts constituted a fraud in law upon respondents and upon the Court.

21

Your respondent further shows that at the time said payments on said note were made to the American National Bank the said bonds of the bankrupt aforesaid for $25,000.00 and $40,000.00 respectively had been approved and accepted by said Court of bankruptcy, and said court had surrendered all possession and control and custody of the bankrupt's property to the bankrupt and had consented, agreed, and acquiesced in the continued transaction by the bankrupt of its ordinary and customary business with said American National Bank pending the adjudication, and thereby represented that said American National Bank, might continue its usual and customary business with said bankrupt and that complainant would look to the said bondsmen on said bonds for any deficiency or other improper disbursement, if any, of the bankrupt's money; that said American National Bank relied upon said representations and continued the usual and customary business dealings with said bankrupt on the faith of said bonds, and orders of said Court, until February 19th, 1921, in the course of which it in good faith accepted payment of said indebtedness and surrendered and released

the collateral aforesaid held by it. None of which ever came into this respondent's hands, that after obtaining said summary order aforesaid the said complainant elected not to pursue same, but in-
[fol. 57] stituted the aforesaid two suits Nos. 985 and 986 at Law, in this Honorable Court against the sureties on said bonds to recover all the moneys paid out by the bankrupt after the filing of the petition in bankruptcy, and including the identical sums so summarily ordered paid over by respondent, and has recovered same as aforesaid.

22

Respondent says that in equity and good conscience the said defendant ought not to be permitted to force respondent to pay said $10,210.00, to him by said summary order and criminal or civil process thereon and at the same time recover and hold the collateral bonds and Trustee Account which the American National Bank surrendered to the Bankrupt at the time of the payment of said note.

23

Your respondent further shows that in equity and good conscience it is entitled to have the said complainant's claim, if any, satisfied by the said bonds upon the faith of which and the orders of the Court accepting same, the American National Bank, dealt with the Bankrupt, and said complainant having elected to pursue his remedy against said bondsmen to recover the same identical moneys ordered paid by respondent and having obtained satisfaction therefrom, ought not to be permitted at the same time to attempt to enforce such payment by summary order. And Respondent says that said bonds and the judgment thereon afford complainant a full adequate, and complete remedy.

24

Your respondent further shows on information and belief that although said bankruptcy proceedings have been pending for nearly four years since the final adjudication in bankruptcy, only one valid claim against said estate has ever been filed and allowed, to-wit, claim of Sam Cannon, amounting to only $355.00, and said Trustee has ample funds on hand to pay same in full; that your Respondent is informed and believes and so alleges that all other claims filed in said estate are being contested, and does not believe that any other claim will finally be allowed therein.

[fol. 58]

25

Your respondent disclaims any intention to disobey any lawful order of this Honorable Court, but says that said order is not a lawful order.

26

Respondent further shows that said order, so far as, same includes interest on said sums is void and said Referee, cannot enforce by

summary order contractural liability, if any, for interest, and said order in attempting to enforce payment of interest from date long anterior to complainant's appointment as Trustee, is on its face invalid.

Wherefore, having fully answered, herein and purged itself of any contempt, your Respondent prays that it be discharged with its costs, and have such other further relief as it may be entitled.

(Signed) Farmers & Mechanics National Bank, by E. Renfro, Cashier. W. E. Spell, G. A. Stultz, Clay Cooke, J. A. Templeton, Solicitors for Respondent.

[fol. 59] Jurat showing the foregoing was duly sworn to by Elmer Renfro omitted in printing.

[fol. 60] EXHIBIT A TO ANSWER

$10,000.00. Fort Worth, Texas, July 27, 1918.

On demand after, date waiving grace, I, we, or either of us, promise to pay to the order of the American National Bank, of Fort Worth, at the banking house in the City of Fort Worth, Texas, the sum of Ten Thousand & no/100 Dollars, for value received, with interest at the rate of 10 per cent per annum from maturity, until paid. And I or we, agree, if this note is not paid at maturity, or if it is placed in the hands of an attorney for collection, to pay all costs and expenses of collection including attorney's fees of ten per cent on the principal and interest of this note. The makers, sureties and endorsers hereby severally waive all notices, presentment for payment, protest and notices of protest of the note, and severally agree that this note may be extended without notice and without releasing any of them.

As collateral security, for the payment of this and every other indebtedness and liability of our- to the said bank due or to become due, or that may hereafter be contracted, we have delivered to the American National Bank, of Fort Worth, Texas, the following securities: $75,000.00 par value 1st Liberty Loan U. S. Bonds, delivered herewith, which securities or any part thereof and any addition thereto or any substitute therefor we hereby authorize said bank or any of its officers to collect when due, crediting the proceeds on the foregoing note, but said bank shall not be liable for neglect or delay in collecting said securities. In case of default of the foregoing note at maturity we further authorize said bank, or any one of its officers, to sell the above mentioned collateral, with or without notice, at public or private sale, or through a broker, at the option of the bank, or any one of its officers, and at such sale said bank may become the purchaser of the whole or any portion of said property, applying the proceeds first to the payment of the expenses of said sale, then to the payment of this note, including interest and attorney's fees, and accounting to us for the surplus, if there should be

any. In case of deficiency we promise to pay to said bank the amount thereof, forthwith after said sale with interest and costs above specified.

The present cash market value of the above collateral is $—. And it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of this note, such an amount of additional security shall be furnished by us as will be satisfactory to the American National Bank; and should such additional security not be furnished within twenty-four hours after demand on us to do so, then and in that event said bank may at once proceed to sell, as above specified, the security herein named, and it is hereby agreed and understood that if recourse is had to the collateral any excess of collateral upon this note shall be applicable to any other note or claim held by said bank against us. In case of exchange of or addition to, the collateral as above named, the provisions of this note shall extend to such new or additional collateral.

(Signed) Walker Grain Co., by J. L. Walker, Pres.

No. 3900.
Due Demand.

Endorsements: Stamped "Paid Nov. 2nd, 1918. American National Bank, Fort Worth, Texas."
On back of note: Credit Oct. 14th, 1918, $1,650.00."

[fol. 61] EXHIBIT B TO ANSWER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT FORT WORTH

No. 266. In Equity.

W. W. WILKINSON, Trustee,

vs.

J. L. WALKER.

Now comes, W. W. Wilkinson, duly appointed, qualified and acting trustee in bankruptcy of the Walker Grain Company, hereinafter styled complainant, and with leave of court amends his original bill of complaint herein, and files this his first amended original bill of complaint, and complaining of J. L. Walker, hereinafter styled defendant, respectfully, shows to the Court:

1

On the 16th day of August, 1918, upon an involuntary petition filed upon said date, the said Walker Grain Company a corporation was duly adjudicated a bankrupt, and ther-after your complainant

was appointed trustee of such bankrupt estate, and as such is authorized to bring this suit.

2

Since the organization of the said Walker Grain Company, in towit the year 1911, the defendant has been its principal stockholder, its president, and has controlled and dominated its affairs.

3

Upon its organization and at all times since up to the said adjudication in bankruptcy, the said Walker Grain Company, for the purpose of hindering, delaying and defrauding its creditors, past, present and future, has kept its assets secreted and concealed by various schemes, transfers and concealments as hereinafter shown.

[fol. 62]

4

The business of said Walker Grain Company was confined to the purchase and sale of grain. It maintained no warehouse or elevator, but bought grain in car-load lots with draft attached to bill of lading and would re-sell and divert said cars upon their delivery. It has no tangible assets and kept itself in a constant state of insolvency and proof against legal process, by fraudulently transferring to its president and defendant here its earnings as fast as they accumulated, either by direct transfers of money or by ostensibly declaring dividends.

5

One manner and method of fraudulently transferring its assets as they accumulated and keeping the same concealed was managed in this wise: The corporation kept a bank account in the American National Bank of Fort Worth styled "Walker Grain Co." or "The Walker Grain Company." Directly after it was organized the defendant J. L. Walker also kept an account in said bank styled "J. L. Walker." The deposits to, and drafts against, said corporation account were so managed that at the close of each day's business the corporation account would customarily show an over-draft. Before closing the books for the day the cashier of said bank would foot up said corporation account, and the over-draft or deficiency in the same would be applied by transferring a sufficient amount from the "J. L. Walker" account to balance the corporation account. The next day, or soon thereafter, when additional deposits had been made to the corporation account another transfer was made back to the "J. L. Walker" account from the corporation account to absorb any credit balance there might be in said corporation account. The nature of the corporation's business was such that at any time there might be a change in the grain market that would cause heavy indebtedness to accrue against it, and in this manner it was kept process proof; and in fact, in several different cases, suits by creditors were brought against

the corporation and its account garnisheed in said bank, and said [fol. 63] bank in every instance made answer to said garnishments that said account was overdrawn, although in each instance there was a large balance at said times in said J. L. Walker account.

Also by means of operating said corporate business as aforesaid those who had debts against said corporation, and who made investigations as to the solvency of said corporation were calculated to become discouraged and not press their claims or to make a reduced settlement of the same.

6

In to-wit February, 1918, the "J. L. Walker Account," which at all times had consisted of moneys that were earned by the corporation, was changed in said bank to read "J. L. Walker, Trustee" and a general secret power and authority was given to said bank to look to said account to supply all overdrafts and other indebtedness of the corporation, and it was agreed that no checks should be drawn against said account save to cover indebtedness to said bank, without the special permission of said bank. The moneys that went into said "Trustee" account were transferred to it by said corporation and were at all times the earnings of said corporation. Thereafter, and up to a short time before the filing of the petition in bankruptcy, the corporation account was kept in a state of continual overdrafts as aforesaid and the deficiencies supplied by transfers from the "Trustee" Account; which was in turn replenished from the corporation account, but no substantial balance- were ever allowed to accumulate in said corporation account.

7

In to-wit June 1917, by permission of the said Walker Grain Co., and bank the defendant was allowed to withdraw $75,000.00 from the Trustee Account and to invest the same in United States Liberty Bonds, which was done, and said Liberty Bonds in said amount, which were registered in the name of the defendant, were placed in said bank, as collateral to secure the bank against overdrafts and indebtedness of the corporation in the same manner as the Trustee ac- [fol. 64] count. This withdrawal left a balance of approximately $50,000.00 in the Trustee Account.

8

On to-wit the year 1914 on to the time of the filing of the petition in bankruptcy, said corporation, with the purpose aforesaid transferred to the defendant, while insolvent and while it was indebted and expected to become indebted to a large extent, large sums of money, the exact amount of same being unknown to complainant but which is known to the defendant, but which complainant avers to have been at least the sum of $300,000.00, a large part of which the defendant invested in the hereinafter described real estate situated in Fort Worth, Tarrant County, Texas, title to which

was taken in the name of defendant and which stands on the deeds of record in said county in the name of defendant; trust funds in which all of the creditors were entitled to share ratably, and that a trust exists upon said property in favor of your complainant herein.

9

That at all times the said moneys in said J. L. Walker account in said Trustee account and the said Liberty Bonds were in reality the concealed assets of the said Walker Grain Company, which had been transferred from and by said company for the purposes aforesaid, and that the defendant J. L. Walker, named as "Trustee" in said "Trustee" Account, was a trustee for the said corporation and its creditors, and afterwards of this complainant.

10

That within four months of the filing of the petition in bankruptcy, and while insolvent, the Walker Grain Company, for the purpose of effectuating and making absolute the fraudulent transfers and concealments aforesaid, and for the purpose of giving the defendant herein a preference and advantage over the other creditors of said corporation, of the same class the said defendant being also a purported creditor of said corporation, and with the full knowledge [fol. 65] of defendant that said transfers would give to him a preference over said such other creditors, committed the following acts:

Transferred to the defendant the balance remaining in the Trustee account, to-wit the sum of $45,000.00; and after the filing of said petition transfered to the defendant the said Liberty Bonds in the par value of $75,000.00, all of which moneys and securities, or their proceeds were transferred into the possession and control of defendant, who has kept the same and has refused to return the same to your complainant or the value thereof, although often demanded, and has thereby secured a greater percentage of his debt than other creditors of the same class.

11

Your complainant says that there are no assets in said bankruptcy estate that have ever come into his hands as trustee of the same, and that there are unsatisfied debts against said estate represented by claims filed and proved therein, and costs and expenses incurred anto be incurred in to-wit the sum of $150,000.00.

12

Your complainant offers to do equity herein as the Court may require.

13

The hereinbefore mentioned real property is described as follows:

Part of Lot 14, Block 11, Daggett's Addition to the City of Fort Worth, conveyed to J. L. Walker by H. E. Sawyer, by deed dated

January 28th, 1917, recorded in Vol. 400, page 438, of the Deed Records of Tarrant County, Texas, to which instrument and record thereof reference is hereby made for further description.

The North one-half of Lot 2, Block 48, City of Fort Worth; 50 feet on Jones Street, 100 feet on Eighth Street, conveyed to J. L. Walker by Ide Callbeck, by deed dated September 10, 1917, recorded in Vol. 525, Page 442, of The Deed Records of Tarrant County, Texas, to which instrument and record thereof reference is hereby made for further description.

[fol. 66] Lot- 17 and 18, Block C-1, Daggett's Addition to the City of Fort Worth, conveyed to J. L. Walker by F. M. Mullins, by deed dated June 29, 1917, recorded in Vol. 520, page 275, of the Deed Records of Tarrant County, Texas, to which instrument and record thereof reference is hereby made for further description.

Lot 5, Block 8, City Addition to Forth Worth, Tarrant County, Texas, conveyed to J. L. Walker by Adam Harder, by executor, by deed dated — Day of ——, 19—, recorded in Vol. 531, Page 159, of the Deed Records of Tarrant County, Texas, to which instrument and record reference is hereby made for further description.

1st Tract.—122 x 200 feet off the North end of Block B-2 Powell's Sub-division of Belleview Hill Addition to the City of Fort Worth, Tarrant County, Texas:

2nd Tract.—54 x 122 feet adjoining said Block B-2 on the west; conveyed by William Reeves to J. L. Walker by deed dated January 8, 1917, recorded in Vol. 509, page 58, of the Deed Records of Tarrant County, Texas, to which instruments and records thereof reference is hereby made for further description.

The South one-half of Lot 2, and North one-sixth of Lot 3, Block 14, Hirschfield Addition to the City of Fort Worth, Tarrant County, Texas, conveyed by Wm. M. Berry, Estate by Guardian, to J. L. Walker by deed dated the 16th day of May, 1916, and recorded in Vol. 480, Page 506, of the Deed Records of Tarrant County, Texas, to which instrument and record thereof reference is hereby made for further description.

Lot 4, Block 57, City of Forth Worth, Tarrant County, Texas.

Lots 4 and 5, Block A-1, Daggett's Addition to the City of Fort Worth, Tarrant County, Texas, conveyed to Myrtel M. Walker, by N. B. Harris by deed dated January 2, 1917, recorded in Vol. 521, Page 413, to which instrument and record, reference is hereby made for further description.

[fol. 67] Part Lot 2, Block 19, Jennings South Addition to the City of Fort Worth, Texas, conveyed to J. L. Walker by Mrs. Ishie J. Henderson, by deed dated December 23rd, 1919, recorded February 6th, 1920, in Vol. 611, Page 464, of the Deed Records of Tarrant County, Texas.

Lot 8, Block 111 of Polytechnic Addition to the City of Fort Worth, Tarrant County, Texas, conveyed to J. L. Walker by J. H. Price, recorded in Vol. 633, Page 28, of the Deed Records of Tarrant County, Texas.

Lot 6, Block 4, J. W. Goldsmith's Sub-Division of W. P. Patillo's Addition to the City of Fort Worth, Texas.

Lot 3, Block D-3 Daggett's Addition to the City of Fort Worth, Texas, recorded in Vol. 632, Page 502, of the Deed Records of Tarrant County, Texas.

North one-half, Lot 2, Block 3, Daggett's Second or South Addition to the City of Fort Worth, Texas, recorded in Vol. 422, Page 400 of the Deed Records of Tarrant County, Texas.

Lot 5, Block 2, Saunders' Addition to the City of Fort Worth, Texas, recorded in Vol. 646, Page 328, of the Deed Records of Tarrant County.

Lots 1 and 2, Block D-3 Daggett's Addition to the City of Fort Worth, Texas, recorded in Vol. 645, Page 329, Tarrant County Deed Records.

Part Lot 2, Block 3, Daggett's Second Addition to the City of Fort Worth, recorded Vol. 646, Page 514, Tarrant County Deed Records.

[fol. 68]

14

That at the time said $45,000.00 balance in said "Trustee" account and said $75,000.00 in Liberty Bonds were by said corporation transferred to the defendant, said corporation was wholly insolvent, had ceased to do business, and had no prospect of resuming its business.

15

That the amounts of money aforesaid prior to said four months' period that were transferred to the defendant, were as aforesaid either made by direct transfers or disguised as the declaration of dividends; the true facts regarding said transactions are not fully known to your complainant, but are known to the defendant who should account therefor.

16

That all of the schemes, transfers and concealments aforesaid were kept concealed from the creditors of said corporation and were unknown to them or to your complainant until after the filing of the petition in bankruptcy herein.

17

Wherefore, in the premises you- complainant prays that he have judgment against the said defendant in the capacity in which he sues for the aforesaid sums, with legal interest; that the defendant be compelled to account herein for the sums of money transferred to him by said Corporation as Dividends or otherwise, and for such portion of said sums of money as have been invested, in the respective parcels of real estate herein described; and that complainant have a foreclosure of his lien against said real estate accordingly. Complainant further prays for all cost of suit and that he have general relief.

Frank Culver, Capps, Cantey, Hanger & Short, H. C. Ray, Stanley Boykin, Attorneys for Complainant. Stanley Boykin, Solicitor.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ADJUDGING RESPONDENTS IN CONTEMPT—Filed May 3, 1924

In the Matter of Show Cause Order Against the Farmers & Mechanics National Bank of Fort Worth, Texas

On this 3rd day of May, A. D. 1924, there coming on to be heard, after due and proper notice, an order to the Farmers & Mechanics National Bank of Fort Worth, Texas, to show cause why it should not be adjudged in contempt of court for refusing to comply with an order heretofore made by the referee in bankruptcy directing said bank to pay unto W. W. Wilkinson, trustee in bankruptcy of the Walker Grain Company, the sum of $1,650.00, with interest thereon at the rate of six per cent per annum from October 11th, 1918 to this date, and the sum of $8,560.00 with interest thereon at the rate of 6 per cent from the 2nd day of November, 1918, to this date.

It is, thereof*e*, ordered, adjudged and decreed by the court that the said bank, the Farmers & Mechanics National Bank of Fort Worth, Texas, a national banking coorporation, be and the same hereby is fined the said sums enumerated with interest thereon as heretofore enumerated; the amount of said fine to be payable to the trustee in bankruptcy and to be collected by execution, and the amount of said fine or any part thereof so collected to be applied in satisfaction of the said summary order. In addition thereto for its [fol. 70] contumacious behavior in this respect the said bank is fined the additional sum of $2,500.00, one-half of which shall be payable to the government of the United States, and one-half to the said trustee in bankruptcy.

That the said last named amount shall also be collectible by execution.

It is further ordered that all costs of this proceeding be taxed against said bank.

It is further ordered that the aforesaid executions be stayed for a period of twenty (20) days from this date.

And all parties being present before the court by representative and by counsel, and the court having heard the answer of the respondent bank, and the motion to strike out said answer presented by the petitioner and trustee in bankruptcy, the court is of the opinion that the motion to strike out said answer should be and the same is hereby overruled. The said bank thereupon offered to prove and tendered evidence to prove each and all of the allegations contained in its said answer, which the court denied, and to which ruling of the said court the said bank then and there excepted.

The Court being advised of the said answer and taking judicial knowledge of the proceedings heretofore had, in this Court and the Honorable Circuit Court of Appeals for the Fifth Circuit in which said summary order has been considered, is of the opinion that the

said bank is in contempt of court in refusing to comply with said order.

To all of which judgment and decree of the Court the said bank then and there, in open court, excepted.

(Signed) Wm. H. Atwell, Judge United States District Court.

[File endorsement omitted.]

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR REHEARING—Filed May 19, 1924

Now comes the Farmers & Mechanics National Bank, respondent in the above entitled cause, and says the decree entered herein on the 3rd day of May, A. D. 1924 is erroneous, and in violation of respondent's Constitutional rights and in excess of the court's jurisdiction, and prays a rehearing therein and shows:

First

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction to force respondent by summary order and contempt proceedings thereon, to pay over to the plaintiff $10,210.00 and interest, alleged and claimed to have been received by the American National Bank, from the Bankrupt, prior to adjudication, in payment of a debt of the Bankrupt to the American National Bank, and alleged to have been a voidable preference, respondent not being a party to said bankruptcy proceedings, and not having received said money.

Second

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction by summary order and criminal process, to force respondent to pay to complainant a Common Law debt, claimed to be owing the Bankrupt by the American National Bank, respondent not being a party to said Bankruptcy proceeding, nor having been served with any process upon any suit to recover same.

[fol. 72]

Third

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction, to set aside by summary order, an alleged voidable preference, and compel by contempt proceedings the payment of same to the Trustee, without trial in a Court of competent jurisdiction, and without suit being filed, process thereon

served, and trial and judgment entered, according to the due course of the law of the land.

Fourth

Said decree of the District Court of the United States, sitting as a Court of Bankruptcy, in attempting to take from respondent by summary order, in criminal process in contempt, said sum of money, without trial is a violation of the Constitution of the United States, in that such proceedings is an attempt without due process of law to deprive respondent of its property, and moneys in that said order is summary, issued without process and trial according to the due course of the law, and violates respondent's right to due process of law in defense of its property, as guaranteed by the Fifth Amendment to the Constitution of the United States.

Fifth

Said decree and order of said Court of Bankruptcy, summarily depriving respondent of its property is in v-olation of Article VII, of the Amendments to the Constitution of the United States, known as the Bill *or* Rights, preserving to respondent the right of jury trial in all actions at Common Law. Respondent's possession of and claim to its own moneys being an adverse claim of right and title thereto, and complainant's action to recover same as shown by his petition therefor, being an action of debt at Common Law.

Sixth

Said order requiring the payment of said moneys was issued upon evidence heard, at the general examination of the bankrupt, with-
[fol. 73] out notice to respondent, and which was had and conducted prior to the time that the petition against respondent was filed, and same was an ex parte hearing, and is not due process of law, and respondent has never been afforded a trial according to the due course of the law.

Seventh

The Refusal of the Honorable District Court to hear any evidence upon the answer of respondent to the order to show cause herein, and its action by criminal process in finding respondent for the benefit of complainant, without trial upon the issues raised in said answer, is a violation of respondent's Constitutional right to due process of law in defense of its property rights.

Eighth

Said Bankruptcy Court is without jurisdiction to assess herein a penal fine against respondent for the use and benefit of the United States in that the United States is not a party hereto, no complaint

on behalf of the United States was filed herein, nor process served with respect thereto, nor trial had thereon, and same is a denial of respondent's Constitutional right to due process of law, and a taking of respondent's property for public use without compensation therefor.

Ninth

The penal fine assessed herein for the benefit of Complainant without trial, evidence, or process, is in violation of respondent's Constitutional rights to due process of law, and is the taking of respondent's money for private use without just compensation therefor, or any right in complainant thereto.

Tenth

The said Court of bankruptcy is without jurisdiction to compel respondent in a summary manner by fine to answer for the debt default, or miscarriage of the said American National Bank, respondent never having received any part of said sums of money, [fol. 74] and said action is an attempt, without process or trial, to compel respondent to pay the debt of another, and is in violation of respondent's Constitutional rights and in excess of any jurisdiction or authority conferred upon said Court of Bankruptcy.

Eleventh

The summary order and decree is unlawful and unconstitutional because respondent never received the said sums of money alleged and found to have been paid to the American National Bank, and there is no allegation nor finding that same ever came into respondent's possession, and the refusal of the Court to permit respondent to prove its sworn answer that same never came into its possession is a denial to respondent of due process of law.

Twelfth

The summary order and the decree herein are unlawful and unconstitutional in that same are based upon evidence taken at an ex parte general examination of the bankrupt, prior to the issuance of any notice to respondent and without any trial had thereon after the issuance of notice to respondent, and same is in violation of the due process of law clause of the Constitution, and the refusal of the Court of Bankruptcy to permit respondent to prove such facts alleged in its verified answer is a violation of respondent's Constitutional rights.

Thirteenth

Said summary order and decree herein are unlawful and unconstitutional in that said Court of Bankruptcy attempts thereby to collect for the benefit of complainant six per cent interest on a large sum of money alleged to have been paid to the American National Bank

and never coming into respondent's possession, and such contractual liability for interest, if any, cannot be enforced by summary order and criminal process in violation of respondent's Constitutional rights.

[fol. 75] Fourteenth

Respondent in response to said rule to show cause having shown under oath in its answer:

(a) That the said Referee, who entered said summary order and filed said findings of fact had a financial interest in said recovery as alleged in respondent's sworn answer, and that he was disqualified to enter same, and same is void.

(b) That he entered same without trial or hearing.

(c) That his findings of fact are erroneous and unsupported by any fact or facts, and the result of his said financial interest in said recovery.

(d) That said Trustee has already received full and complete satisfaction of said debt as against the bondsmen on the said bankrupt's supersedeas bonds.

(e) That said Trustee has recovered the collateral held by said American National Bank at the time said debt was paid by the bankrupt, as alleged under oath by respondent.

(f) That said sums never came into respondent's possession. Said Court in refusing to hear any evidence thereon and entering judgment without hearing or trial, violated respondent's Constitutional rights to due process of law in defense of its rights. The attached affidavits show the true facts with respect to said matters, and respondent offers such evidence in support of its defense herein, and as grounds for rehearing herein.

Fifteenth

That the Court erred herein in that it has assessed three separate and distinct fines and penalties against respondent for the same offense in that said court has first fined respondent $1,650.00 with 6% Interest thereon from October 16, 1918; and has thereupon again fined respondent $8,560.00 with 6% interest from Nov. 2nd, 1918, all for the benefit of complainant, and has then again fined respondent $2,500.00, one half for the benefit of complainant and one half for the U. S. Government; that same constitutes three separate and distinct fines or punishments inflicted for the same offense; [fol. 76] that same is an effort to collect complainant's common law debt by fine and criminal process, and is in violation of the due process of law clause of the Constitution; that said punishment in so far as *asme* attempts to collect the debt alleged for complainant is unlawful, and erroneous.

Sixteenth

That in support of this motion for rehearing respondent presents herewith the affidavits of Elmer Renfro, and J. T. Pemberton of the Farmers & Mechanics National Bank, J. L. Walker President of the Walker Grain Company, W. L. Carr Bookkeeper for the Walker Grain Company, Judge Mike E. Smith, and Clay Cooke, marked Exhibits A, B, C, D, E and F, respectively, and makes same a part hereof, and refers to and makes a part hereof respondents verified answer herein, and says that it is error and a denial of due process of law for the Court to refuse to hear said evidence, or any evidence whatever, and to summarily assess said heavy penalties upon respondent without knowing or being advised of the truth of said matters by evidence.

Wherefore, respondent prays that said decree herein be set aside and held for naught; that the Court hear evidence of the truth of the matter set forth in the pleadings herein, and determine the truth thereof, that upon such rehearing respondent be discharged, that in any event said decree be reformed by eliminating therefrom said two fines of $1,650.00 and $8,560.00 respectively; that the Court set aside and declare null and void said summary order for the reasons set forth in respondent's answer and grant unto respondent such other and further relief to which in law and equity it may be entitled and it will ever pray.

W. E. Spell, J. A. Templeton, Clay Cooke, G. A. Stultz, Attorneys for Respondent.

[fol. 77] EXHIBIT A TO MOTION

STATE OF TEXAS,
County of Tarrant, ss:

Before me the undersigned authority, on this the 12th day of May, A. D. 1924, personally appeared Elmer Renfro, who being by me first duly sworn, states upon oath that he was Cashier of the American National Bank during the year 1918, and is now and has been since January, 1919, Cashier of the Farmers & Mechanics National Bank, of Ft. Worth, Texas.

That heretofore, on the 27th day of July, 1918, the Walker Grain Company was indebted to the American National Bank, in the sum of $10,000.00, as evidenced by its promissory note bearing said date, payable to the order of said American National Bank, in said sum, which said note was at said time secured by $75,000.00 of Liberty Bonds, in possession of said American National Bank; that said securities were deposited with said bank more than 18 months prior to the filing of the petition in bankruptcy against said Walker Grain Company on August 16th, 1918, to secure said bank in all indebtedness of the bankrupt to it, past, present and future, and was also

secured by bills of lading covering grain indorsed to and held by said American National Bank at the time of making said loan of value $6,600.00.

That in the usual course of business of the Walker Grain Company, with the American National Bank, the said Walker Grain Company, on October 14, 1918, paid to the American National Bank by its check drawn on its checking account in the American National Bank, the sum of $1,650.00, upon said indebtedness, and in like manner on November 2nd, 1918, paid to the American National Bank, $8,5[illegible]0.00, upon said indebtedness, whereupon said American National Bank, surrendered to J. L. Walker, President and Manager of said Walker Grain Company, the aforesaid collateral held by it [fol. 78] and satis- said indebtedness.

That at said times aforesaid the Farmers & Mechanics National Bank of Fort Worth, Texas, was in no manner connected with the American National Bank and had nothing to do with the execution or payment of said indebtedness of Walker Grain Co., that in January, 1919 the Farmers & Mechanics National Bank took over the assets of the American National Bank, but received no part of said sums aforesaid paid to the American National Bank, and has never come into possession of said moneys.

That on or about March 24th, 1921, affiant was subpœnaed as a witness before Glenn Smith, Esq., Referee in Bankruptcy at a hearing of the general examination of the bankrupt, and appeared and testified thereat to the foregoing facts. That thereafter on or about April 7th, 1921, the said Glenn Smith issued an order on the Farmers & Mechanics National Bank to show cause why it should not be summarily ordered to pay over to the Trustee the aforesaid sums of money, and on or about said date filed its verified plea to the jurisdiction of the Referee setting up said facts aforesaid, but filed no plea to the merits. That said matter was never thereafter set down or heard by said Referee and no hearing or trial, other than the aforesaid examination of the bankrupt was ever had, but affiant is advised that thereafter on or about June 2nd, 1921, the said Referee, without trial, but on the evidence received by the Referee at the general examination of the bankrupt held prior to the notice to show cause aforesaid, entered a summary order against said Farmers & Mechanics National Bank, ordering it to pay over to said Trustee said sums of money.

[fol. 79] Affiant says that said Bank did not pay over said sums and on or about April 21st, 1924, said Referee served notice on affiant to pay same on or before April 21st, 1924, or said Referee would certify the facts to the U. S. District Judge; that said Bank filed its verified answer thereupon asking the said Referee to hear its evidence as heretofore set forth, and as set forth in its verified answer filed herein, but said Referee refused to do so. Thereafter said Bank was ordered to show cause on May 3rd, 1924 before Hon. Wm. H. Atwell U. S. District Judge why it should not be held in contempt for refusal to pay over said moneys, and on said date appeared and filed its verified answer, which is here referred to, setting

up among others, the aforesaid facts. That upon the call of said matter said Bank through its attorneys offered to prove the aforesaid facts by witnesses, including affiant, but said court refused to hear any evidence, and particularly the aforesaid evidence of affiant.

That the facts set forth in the answer of the said Bank herein and verified by affiant are true, and same can be established by the testimony of affiant, J. T. Pemberton, J. L. Walker, W. L. Carr and other witnesses.

(Signed) Elmer Renfro.

Subscribed and sworn to before me this 12 day of May, A. D. 1924. I. L. Van Zandt, Jr., Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 80] EXHIBIT B TO MOTION

STATE OF TEXAS,
County of Tarrant, ss:

Before me, the undersigned authority on this day personally appeared J. T. Pemberton, who being by me first duly sworn, states upon oath that during the year 1918 he was Vice-President of the Farmers & Mechanics National Bank of Fort Worth, Texas; that said bank had no dealings whatsoever with the Walker Grain Company with respect to the loan of $10,000.00 and its repayment to the American National Bank, as detailed in the affidavit of Elmer Renfro hereto attached and no other dealings whatever during said year with said Walker Grain Company; that in 1919 the Farmers & Mechanics National Bank took over the assets of the American National Bank, but did not receive any portion of said moneys, aforesaid, and knew nothing of said matters until it was ordered to show cause before the Referee April 7, 1921 why it should not summarily pay over said sums to the Trustee, whereupon it filed its plea to the jurisdiction of the said Referee; that if any trial or hearing was had before the Referee after the filing of said plea to the jurisdiction affiant had no notice or knowledge thereof.

(Signed) J. T. Pemberton.

Subscribed and sworn to before me this 12th day of May, 1924. I. L. Van Zandt, Jr., Notary Public, Tarrant County, Texas. (Seal.)

[fol. 81] EXHIBIT C TO MOTION

STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared J. L. Walker, who being by me first duly sworn states on

oath that during the year 1918, and prior thereto he was President and General Manager of the Walker Grain Company.

That heretofore, on the 27th day of July, 1918, the Walker Grain Company was indebted to the American National Bank, in the sum of $10,000.00, as evidenced by its promissory note bearing said date, payable to the order of said American National Bank, in said sum, which said note was at said time secured by $75,000.00 of Liberty Bonds, in possession of said American National Bank; that said securities were deposited with said bank more than 18 months prior to the filing of the petition in bankruptcy against said Walker Grain Company on August 16th, 1918 to secure said bank in all indebtedness of the bankrupt to it, past, present and future, and also was secured by bills of lading covering grain of value $6.600.00 indorsed to and held by said American National Bank at the time of making said loan.

That in the usual course of business of the Walker Grain Company, with the American National Bank, the said Walker Grain Company, on October 14th, 1918, paid to the American National Bank by its check drawn on its checking account in the American National Bank, the sum of $1.650.00, upon said indebtedness, and in like manner on Nov. 2nd, 1918, paid to the American National Bank $8.560.00, upon said indebtedness, whereupon said American National Bank, surrendered to J. L. Walker, President and Manager of said Walker Grain Company, the aforesaid collateral held by it and satisfied said indebtedness.

That the said Walker Grain Company had no dealings whatever with the Farmers & Mechanics National Bank with respect to said matters, but all its dealings were with the American National Bank.

That on March 3rd, 1918, the Referee Glenn Smith, began the general examination of the bankrupt, and after hearing evidence of the aforesaid transactions, the Trustee on March 27th, 1921, filed with the Referee a petition to recover said $10,210.00 of said Farmers & Mechanics National Bank as set forth in paragraph 10 of said bank's answer herein, to which said bank appeared solely to object to the jurisdiction of the Referee; that no hearing whatever was had on said motion, but on the general examination of the bankrupt theretofore held said Referee entered the summary order against the bank to pay over said money, without trial or hearing other than the aforesaid general examination of the bankrupt. That affiant has been present at every hearing had or held in connection with the Walker Grain Company bankrupt, and no trial or hearing has ever been held by the Referee on said motion to require the said bank to pay over said moneys and said bank has never had a trial or hearing thereon at any time.

That the said order of said Referee was procured by F. P. Culver, Jr., as attorney for the said Trustee, who at the said time was the general law partner of the said Referee, and entitled to a share in the Referee's fees, and said Referee was entitled to a share in said Culver's fees for procuring said summary order, which facts were unknown to affiant and said bank at said time.

[fol. 82] That after procuring said summary order said Trustee sued affiant in cause No. 266 Equity, claiming said $75,000.00 Liberty Bonds as assets of said bankrupt and procured judgment and decree against affiant for $19,000.00 thereof, as set forth in paragraph 14 of the answer of the Farmers & Mechanics National Bank herein.

That said Trustee also sued affiant as surety on the supersedeas bond of the Walker Grain Company described in paragraph 8 of said bank's answer and in said suit No. 985, at Law recovered judgment against affiant for the indentical $10,210.00 so ordered paid over by said bank. That by virtue thereof said Trustee has recovered said $10,210.00 twice and now seeks to punish said bank for contempt for not paying same to him without any character of trial or hearing.

That affiant has read the answer of the said bank filed herein and knows the facts with respect thereto and the allegations of said answer are true.

That said affiant was present in the U. S. District Court at Dallas, Texas, May 3rd, 1924, when said bank appeared to show cause why it should not be adjudged in contempt of court for failing to pay over said money, as ordered by the referee, and was ready to testify as a witness and to produce the documentary proof showing the truth of the foregoing facts and each and every fact alleged in said bank's verified answer herein, but said Court refused to hear any testimony or receive any evidence whatever, and entered up said fine against said bank without hearing any evidence whatever.

(Signed) J. L. Walker.

Subscribed and sworn to before me this 12 day of May, A. D. 1924. Clay Cooke, Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 83] EXHIBIT D TO MOTION

STATE OF TEXAS,
County of Tarrant, ss:

Before me the undersigned authority on this day personally appeared W. L. Carr, who being by me first duly sworn, states upon oath that during the year 1918, he was bookkeeper for the Walker Grain Company; that he is familiar with the loan of $10,000.00 made by the American National Bank to Walker Grain Company July 27th, 1918, detailed in the said affidavit of Elmer Renfro hereto attached; that said money was borrowed to take up bills of lading on grain valued at $6,600.00 which were indorsed by Walker Grain Company and deposited with the American National Bank as security therefor; that in addition thereto said note was secured by $75,000.00 of Liberty bonds in the possession of said American National Bank. That said Walker Grain Company had transacted its usual banking business with said American National Bank for several

years prior to the execution of said note, and continued thereafter to transact its usual and customary banking business with said bank until the dissolution of said bank about December 31st, 1918, and during the time from said July 27th, 1918, until said Dec. 31st, 1918, it deposited a total of approximately $55,400.00 in its said checking account with the American National Bank, that one of said deposits was the $10,000.00 loan aforesaid and affiant wrote the checks of October 14th 1918, and November 2nd, 1918, being Nos. 106 and 120, which checks were for the sums of $1,650.00 and $8,560.00 respectively, and were drawn by Walker Grain Company payable to said American National Bank upon the said checking account of said Walker Grain Company in said American National Bank and paid out of said account,

That affiant was present at all the hearings had before the said Referee prior to the issuance of the summary order against the Farmers & Mechanics National Bank; that the said Referee began the general examination of the bankrupt March 3rd, 1921, and on or about March 26th, 1921, after evidence had been given with respect to the aforesaid loan of $10,000.00 issued an order on the Farmers & Mechanics National Bank to show cause why it should not be summarily ordered to pay over said moneys to the Trustee; that thereafter no hearing was had on said Motion against said bank, but after the close of said bankrupt's general examination said Referee entered said summary order against said bank, without any other or further hearing; that affiant was present in the U. S. Distrit Court at Dallas, Texas, on May 3rd, 1918, when said Farmers & Mechanics National Bank appeared to show cause why it should not be punished for contempt in not paying over said sums of money and affiant was ready to testify to the foregoing facts, and counsel for said bank asked the Court to hear the evidence, but said Court refused to hear any evidence at said time.

(Signed) W. L. Carr.

Subscribed and sworn to before me this the 12th day of May A. D. 1924. Clay Cooke, Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 84] EXHIBIT E TO MOTION

STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared Mike E. Smith, being by me first duly sworn, states upon oath:

That he is a member of the law firm of Slay, Simon & Smith of Fort Worth, Texas, and as such represented the Farmers & Mechanics National Bank in preparing and filing with the Honorable Glenn Smith, Referee, in Bankruptcy, the Plea to the Jurisdiction of the

Referee ordering the said Bank to pay over to the Trustee in Bankruptcy the sum of $10,210.00 alleged to have been paid on October 11, and November 2nd, 1918.

That in preparing said plea to the jurisdiction filed in said plea April 7th, 1921 — inadvertently used the terms "respondent" and "Farmers & Mechanics National Bank" in describing the transactions by which the said $10,210.00 was loaned to the Walker Grain Company, July 27th, 1918 and repaid in two payments of $1,650.00 October 11, 1918, and $8,560.00 November 2nd, 1918, wher-as, said plea should have described all of said transactions as having been between the said Walker Grain Company and the American National Bank for the reason that it appears from the note, itself, and the checks given by the Walker Grain Company in payment thereof, that the transactions were had with the American National Bank, that being the bank at that time and for a long time previous thereto with which the Walker Grain Company carried its account, and transacted its business including this note and payments thereon, and this transaction would neecssarily have been with the American National Bank and not with the Farmers & Mechanics National Bank. [fol. 85] Affiant is advised and states on his knowledge and belief that the Farmers & Mechanics National Bank did not take over the affairs of the American National Bank until on or about January 1, 1919. This plea to the jurisdiction being drawn and filed on or about April 7th, 1921, thereafter and in drawing said plea, affiant had in mind the facts of that transaction as a closed transaction more in the nature of describing the transaction than in the name of the particular parties with which the same was had, and inadvertently referred to the Farmers & Mechanics National Bank, respondent whereas the reference should have been alone to the American National Bank.

The same error occurs in the Petition for Review, filed June 11th, 1921.

(Signed) Mike E. Smith.

Subscribed and sworn to before me this 15th day of May, A. D. 1924. Pearl Graham, Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 86] EXHIBIT F TO MOTION

STATE OF TEXAS,
County of Tarrant:

Before me the undersigned authority on this day personally appeared Clay Cooke, who being by me first duly sworn states on oath that he is a practicing attorney of Ft. Worth, Texas, and was retained to represent the Farmers & Mechancis National Bank on the appeal of the said Bank from the summary order of the referee as affirmed by the U. S. District Court ordering said bank to pay over to the Trustee the sum of Ten Thousand Two Hundred Ten ($10,210.00)

Dollars, and also argued said matter in the U. S. District Court, that in preparing said appeal, affiant discovered that the only issue raised by the bank before the referee was the issue of the referee's jurisdiction to entertain summary proceedings against an adverse claimant; that no other plea was filed before the referee by former counsel, Mike E. Smith; that in presenting same to the Circuit Court of Appeals the only issue presented was the issue of summary jurisdiction of the referee; the issues raised by the Farmers & Mechanics National Bank in the contempt proceedings, were not raised before the referee, and were not raised before the Circuit Court of Appeals, save and except the issue of jurisdiction of the referee, over property held by an adverse claimant, and the issues showing the bank to be an adverse claimant.

That affiant discovered that in the plea to the jurisdiction filed by said Mike E. Smith he had inadvertently recited the transactions with respect to the making and repayment of said loan, as if the same occurred with the Farmers & Mechanics National Bank, wher-as all of said transactions, were had as alleged by the Trustee, and as shown by the evidence, with the American National Bank prior to the consolidation of said two banks; that in affiants specifications of error filed in the Circuit Court of Appeals affiant referred to said transactions as having been had with the "Farmers & Mechanics National Bank or its predecessor, American National Bank" whereas said transactions were in fact all had with the American National Bank and not with the Farmers & Mechanics National Bank and any inference that might be drawn from such specifications of error that any of said transactions were had with the Farmers & Mechanics National Bank is not in accordance with the facts, as all of said transactions were had with the American National Bank.

(Signed) Clay Cooke.

Subscribed and sworn to before me this 15th day of May, A. D. 1924. Wade Potter, Notary Public in and for Tarrant County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY OF W. W. WILKINSON TO MOTION FOR REHEARING—Filed May 24, 1924

Now comes W. W. Wilkinson, Trustee in bankruptcy of the Walker Grain Co. Bankrupt, and replying to the motion for rehearing of the said bank in said contempt proceedings respectfully shows to the Court:

I

That all of the alleged defenses to the said contempt proceeding, and to the enforcement of the summary orders in question, were by said bank heretofore set up and urged in the proceedings in which said summary orders were made and reviewed.

II

Your petitioner further shows to the Court that the said Farmers & Mechanics National Bank is not the real party at interest in this proceeding; and that said bank will not eventually have to pay the amount of said summary orders; and that said Farmers & Mechanics National Bank fully took over and accepted the liabilities of its predecessor, the American National Bank, all of which is especially shown by duly certified copy of the deed of trust attached hereto in which deed of trust the said J. L. Walker executes an obligation upon his real estate in favor of said Farmers & Mechanics National Bank to indemnify said bank against any loss by reason of said sum-
[fol. 88] mary orders.

III

Wherefore, petitioner says that said motion for rehearing should be denied.

Respectfully submitted,
George M. Conner, Caps, Cantey, Hagner & Short, Boykin & Ray, Attorneys for Petitioner.

Jurat showing the foregoing was duly sworn to by Stanley Boykin omitted in printing.

[fol. 89] EXHIBIT TO REPLY

STATE OF TEXAS,
County of Tarrant:

J. L. Walker et ux.

to

F. & M. Natl. Bank

Deed of Trust

Know all men by these presents: That we J. J. Walker and wife, M. M. Walker, of the County of Tarrant and State of Texas, for and in consideration of the sum of $10.00 to us in hand paid by Ben. H. Martin, Trustee, of Fort Worth, Tarrant County, Texas, and in further consideration of the trust hereinafter mentioned, have granted, sold and conveyed, and by these presents do grant, sell and convey

unto the said Ben. H. Martin, trustee, and to his successors or substitute in this trust, and to his and their assigns forever, all and singular the following described property, situate, lying and being in the County of Tarrant and State of Texas, to-wit:

First. Lots 1 and 2, in Block D-3, Daggett's Addition to Fort Worth, Texas.

Second. The North half of Lot 2, in Block 3, Daggett's Addition to Fort Worth, Texas.

Third. Lot 3, in Block D-3, Daggett's Addition to Fort Worth, Texas.

Fourth. The North thirty feet of lot 13, of Daggett's Hillside Addition to Fort Worth, Texas

Fifth. Lots 17 and 18, in Block C-1, Daggett's Addition to Fort Worth, Texas.

Sixth. Lots 4, Block D-3, Daggett's Addition to Fort Worth, Texas.

To have and to hold the herein described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Ben. H. Martin, trustee, to his successor or substitute in this trust, and to his and their assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators to war- [fol. 90] rant and forever defend all and singular the said premises unto the said Trustee, to his successor or substitute, and to his and their assigns forever against any person whomsoever lawfully claiming or to claim the same or any part to warrant and forever defend all and singular the said premises unto the said trustee, to his successor or substitute, and to his and their assigns forever against any person whomsoever lawfully claiming or to claim the same or any part thereof; in trust, however, for the following purposes upon the following conditions, to-wit:

That this Deed of Trust is executed by the grantors herein for the purpose of indemnifying and holding harmless the Farmers & Mechanics National Bank of Fort Worth, Texas, against any loss or damage growing out of a suit by W. W. Wilkinson, trustee, vs. Farmers & Mechanics National Bank, No. 980, at law, in United States District Court for the Northern District of Texas, wherein it is alleged that the Farmers & Mechanics National Bank is a preferred credit of the Walker Grain Company, bankrupt, on account of said bank receiving payments from said Walker Grain Comuany of two notes, one for $35,000.00, dated April 16th, 1918, and one for $50,000.00, dated 9th day of April and renewed May 31st, 1918. This conveyance is also for the purpose of indemnifying said bank against loss by reason of the summary motion of said trustee, W. W. Wilkinson, before the Referee in Bankruptcy, in Case No. 1001, Re Walker Grain Company, bankrupt, wherein said trustee seeks to recover of the Farmers & Mechanics National Bank $10,000.00 alleged to have been received by the bank as preferred creditor of said bankrupt, and wherein the referee in bankruptcy entered an order directing said bank to pay over said amount of money to the trustee, said bank having filed a petition to review said order, the hearing of which is now

pending in the United States District Court for the Northern District of Texas.

Now, if the said J. L. Walker or M. M. Walker shall well and truly fully indemnify and save harmless the said Farmers & Mechanics [fol. 91] National Bank against any liability damage or loss and protect the said bank against the payment of any judgment, and in compliance with any order that may be entered against it in any of said causes or proceedings then this conveyance shall become null and void and these presents all be released in due form at our expense, and we further covenant and agree with said Farmers & Mechanics [fol. 92] National Bank that we will at all times during the continuance of this trust pay all taxes and assessments that may become due and payable, and that we will keep the buildings and improvements on the above described premises insured against loss by fire in some solvent insurance company to the extent insurance can be obtained, with loss, if any, payable to said Farmers & Mechanics National Bank as its interest may appear, and if we fail to keep said taxes promptly paid or fail to keep said property so insured, then we hereby authorize the said Farmers & Mechanics National Bank to have the same insured, with loss so payable to it, and agree that premiums paid therefor as well as any amount expended for taxes shall be treated as expenses and costs of executing this trust, but in case of default or failure to fully indemnify and save harmless the said Farmers & Mechanics National Bank against any damages or loss accruing from each and all of the above set out matters and things, then and in that event the said trustee is hereby authorized and empowered, and it shall be his special duty at the request of the said Farmers & Mechanics National Bank to sell the above described property to the highest bidder for cash at the court house door of the County in which the property, or any part thereof, is situated, at public outcry between the hours of 10 o'clock a. m. and 4 o'clock p. m. on the first Tuesday in any month, after having given notice of such sale by posting up written or printed notices at three public places in said County of Tarrant and State of Texas, one of which notices shall be at the Court House door of said County of Tarrant, State of Texas, and all of which notices shall have been posted for at least 21 days successively next before the day of sale, and after such sale to make the purchaser or purchasers hereunder good and sufficient deeds in the name of the grantor herein, conveying the property so sold to the purchaser in fee simple, with general warranty of title, and to receive the proceeds of said sale and apply the same as follows:

First. To the payment of all necessary costs and expenses incident to the execution of said trusts, including a fee to the trustee of 5 [fol. 93] per cent to be estimated upon the amount realized at said sale.

Second. To the payment of all loss or damage accruing to the said Farmers & Mechanics National Bank by reason of the matters and things hereinabove set out.

Third. The remainder, if any there shall be, shall be paid to us or to our heirs, assigns or legal representatives.

In case of the death of said Ben. H. Martin, trustee or his removal from the County of Tarrant, State of Texas, or of his refusal, failure or inability, for any reason, within ten days after such request by the Farmers & Mechanics National Bank to make said sale or to perform said trust, then said Farmers & Mechanics National Bank may appoint in writing, a substitue trustee, who shall thereupon succeed to all the estate, rights, powers and trusts hereinbefore granted to and vested in said trustee.

And it is further specially agreed by the parties hereunto, that if any deed or deeds given by any trustee or substitute duly appointed hereunder, any and all statements of facts or other recitals therein made as to the non-payment of the money secured, or as to the request to sell, the time, place, terms of sale, and property to be sold having been duly published, or as to any other act or thing having been duly done by any trustee, or substitute, shall be taken by any and all courts of law and equity as prima facie evidence that the said statement or recitals do state facts and are without question to be accepted. And we, the said grantors do hereby ratify and confirm any and all acts that the trustee, or substitute, or his successors in this trust may lawfully do in the premises by virtue hereof. Erasures and interlineations made and approved before signing.

Witness our hands this 14 day of December, A. D. 1921.

J. L. Walker, M. M. Walker.

THE STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally ap-
[fol. 94] peared J. L. Walker and M. M. Walker, his wife both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purpose and consideration therein expressed, and the said M. M. Walker, wife of the said J. L. Walker, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said M. M. Walker, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office, this 14 day of December, A. D. 1921.

E. C. Harper, Notary Public in and for Tarrant County, Texas. (L. S.)

14 day of December, A. D. 1921.

Filed for record Dec. 15, 1921, at 11.20 A. M. Recorded Dec. 22nd, 1921, at 1.50 P. M.

Bart Mynatt, County Clerk Tarrant County, Texas, by Don McDugal, Deputy.

[fol. 95] THE STATE OF TEXAS,
County of Tarrant:

I, Ed. L. Sorrels, Clerk County Court, of Tarrant County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Deed of Trust from J. L. Walker et ux, to F. & M. National Bank, as same appears of record in the Deed of Trust Records of Tarrant County, in Volume 192, Page 260.

Witness my hand, and seal of said Court, at my office in the City of Fort Worth, Texas, this 24 day of May, A. D. 1924.

Ed. L. Sorrels, Clerk County Court Tarrant County, Texas,
by Dena E. Dinkins, Deputy. (Seal.)

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—Filed May 31, 1924

This 31st day of May, 1924, there coming on to be heard the respondent's motion for a rehearing herein; and the same having been duly considered by the Court is denied, to which the respondent excepts.

Wm. H. Atwell, Judge.

[File endorsement omitted.]

[fol. 97] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF THE COURT—Filed June 2, 1924

At the request of the Farmers & Mechanics National Bank, respondent in the above cause, it is hereby certified that the Farmers & Mechanics National Bank, at Fort Worth, Texas, did, by its answer, filed herein, raise the issue of the jurisdiction of this court as a court of bankruptcy, to enter a decree requiring it to pay to the trustee certain funds, and, also, by said answer raised issues alleged to involve the construction and application of the constitution of the United States. The issues so presented to this court were decided adversely to the Farmers & Mechanics National Bank.

The proceeding in which the bank raised these questions was instituted in this court by the trustee in bankruptcy after the referee had ordered the bank to pay over certain funds to the trustee, and, after that order had been affirmed by the district court, and, after

the United States Circuit Court of Appeals for the Fifth Circuit had affirmed the district court, and after a writ of certiorari had been denied by the Supreme Court of the United States. Thereupon the trustee filed his motion asking this court to cause the bank to show cause why it should not be adjudged in contempt for its failure to comply with the orders theretofore entered respecting said funds.

[fol. 98] 1st

The bank contends that the provisions of the bankruptcy act, as amended, do not confer jurisdiction on a court of bankruptcy upon petition of the trustee, to summarily order a person, not a party, to the bankruptcy proceedings, to pay over to the trustee a sum of money alleged and found to have been paid to such party. In the instant case the party is a bank, and the facts show that the payment was actually made to the American National Bank, which consolidated with the Farmers & Mechanics National Bank, the complaining bank, some 60 days after the payment; such complaining bank taking over all of the assets and liabilities of the original bank; and such payment being made after the filing of the petition in bankruptcy and before adjudication thereon and in satisfaction of a debt.

2nd

It is also contended by the bank that the provisions of the bankruptcy act do not confer jurisdiction upon a court of bankruptcy to compell such payment by fine as for a contempt of court.

3rd

Likewise it is contended that the provisions of said bankruptcy act do not confer any such jurisdiction, and, if they do they violate the due process of law clause and Article Seven of the Bill of Rights.

(Signed) Wm. H. Atwell, United States District Court.

Done at Dallas, Texas, May 31st, A. D. 1924.

[File endorsement omitted.]

[fol. 99] In United States District Court

[Title omitted]

Petition for and Order Allowing Appeal—Filed May 31, 1924

The Farmers & Mechanics National Bank, of Fort Worth, Texas, a National banking corporation, respondent, being aggrieved by the decree and order made and entered on the 3rd day of May, A. D.

1924, in the above entitled cause, hereby appeals from said order and decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the proceedings, record, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States; and that this Honorable Court file herein its certificate as to the Jurisdictional issue involved.

J. A. Templeton, G. A. Stultz, W. E. Spell, Clay Cooke, Attorneys for Defendant Respondent.

The foregoing claim of appeal is allowed, and upon appellant filing herein good and sufficient bond, conditioned as provided by law, in the sum of $18,000.00, payable to complainant W. W. Wilkinson, Trustee, and the United States of America, as their respective interests appear, same shall operate as a supersedeas herein and suspend the enforcement of the decree entered herein pending such appeal.

Dated this 31st day of May, A. D. 1924.

(Sgd.) Wm. H. Atwell, U. S. District Judge.

[File endorsement omitted.]

[fol. 100] In United States District Court

[Title omitted]

Assignment of Errors—Filed May 31, 1924

The Appellant in the above entitled cause, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which it says the decree entered herein on the 3rd day of May, A. D. 1924 is erroneous, and in violation of appellant's Constitutional rights and in excess of the court's jurisdiction, to-wit:

First

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction to force appel-ant by summary order and contempt proceedings thereon, to pay over to the plaintiff $10,210.00 and interest, alleged and claimed to have been received by the American National Bank, from the Bankrupt prior to adjudication, in payment of a debt of the Bankrupt to the American National Bank, and alleged to have been a voidable preference, appellant not being a party to said bankruptcy proceedings, nor served with process therein.

Second

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction by summary order and criminal process, to force appellant to pay to the appellee a Common Law debt, claimed to be owing the Bankrupt's Trustee by the American [fol. 101] National Bank, appellant not being a party to said Bankruptcy proceeding, nor having been served with any process upon any suit to which it was a party to recover same.

Third

The District Court of the United States, sitting as a Court of Bankruptcy, is without jurisdiction, to set aside by summary order, an alleged voidable preference, and compel by contempt proceedings the payment of same to the Trustee, without suit being filed in a Court of competent jurisdiction, process thereon served and trial had and judgment entered, according to the due course of the law of the land.

Fourth

Said decree of the District Court of the United States, sitting as a Court of Bankruptcy, in attempting to take from appellant by summary order, and criminal process in contempt, said sum of money, without trial is a violation of the Constitution of the United States, in that such proceeding is an attempt without due process of law to deprive appellant of its property, and moneys in that said order is summary, issued without process and trial according to the due course of the law, and violates appellant's right to due process of law in defense of its property, as guaranteed by the Fifth Amendment of the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law and is beyond any jurisdiction conferred by Sections 2 and 23 of the Bankruptcy Act, or of any other provision of law upon said Court; and if said provisions are so construed as to confer such summary jurisdiction upon said Court then same violate said provision of the Constitution.

Fifth

Said decree and order of said Court of Bankruptcy, summarily depriving appellant of its property is beyond its jurisdiction and is [fol. 102] in violation of Article VII of the Amendments to the Constitution of the United States, known as the Bill of Rights, providing that "In suits at Common Law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" appellant's possession of and claim to its own moneys being an adverse claim of right and title thereto, and complainant's action to recover same as shown by his petition therefor, being an action of debt at Common Law.

Sixth

Said order requiring the payment of said moneys was issued upon evidence heard, at the general examination of the Bankrupt, had and conducted prior to the time that the petition of the Trustee against appellant was filed, and prior to any process or notice to appellant, and same was an ex parte hearing, and is not the due process of law guaranteed by the Fifth Amendment of the Constitution as set forth above, and appellant has never been afforded a trial according to the due course of the law, as required by Art. V of Amendments to the Constitution, nor do said proceedings give said court jurisdiction over the person of appellant to enter said decree.

Seventh

The Refusal of the Honorable District Court to hear any evidence upon the answer of appellant to the order to show cause herein, and its action by criminal process in finding appellant for the benefit of appellee, without trial upon the issues raised in said answer, is a violation of appellant's Constitutional right to due process of law in defense of its property rights, as guaranteed by the Fifth Amendment to the Constitution of the United States, as set forth in the Fourth Assignment of Error herein.

Eighth

Said Bankruptcy Court is without jurisdiction to assess herein a [fol. 103] penal fine against appellant for the use and benefit of the United States in that the United States is not a party hereto, no complaint on behalf of the United States was filed herein, nor process served with respect thereto, nor trial had thereon, and same is a denial of appellant's Constitutional right to due process of law, as guaranteed by Art. V of the Amendments to the Constitution, as set forth in the Fourth Assignment of Error herein.

Ninth

The penal fine assessed herein for the benefit of Appellee, W. W. Wilkinson, Trustee, without trial, evidence, or process, is in violation of Appellant's Constitutional rights to due process of law, as guaranteed by Art. V of the Amendments to the Constitution, and is beyond the lawful jurisdiction of said Court of Bankruptcy.

Tenth

The said Court of Bankruptcy is without jurisdiction to compel appellant in a summary manner by fine to answer for the debt default, or miscarriage of the said American National Bank, appellant never having received any part of said sum of money, and said action is an attempt without process or trial to compel appellant to pay the debt of another, and is in violation of appellant's Con-

stitutional rights under Article V of the Amendments to the Constitution, to due process of law in the taking of its property, and in excess of any jurisdiction or authority conferred by law upon said Court of Bankruptcy.

Eleventh

The summary order and decree is unlawful and unconstitutional because appellant never received the said sums of money alleged and found to have been paid to the American National Bank, and there is no allegation or finding that same ever came into appellant's [fol. 104] possession, and the refusal of the Court to permit appellant to prove its sworn answer that same never came into its possession is a denial to appellant of due process of law, as guaranteed by Art. V of the Amendments to the Constitution, as set forth in the Fourth Assignment of Error herein.

Twelfth

The summary order and the decree herein are unlawful and unconstitutional in that same are based upon evidence taken at an ex parte general examination of the bankrupt, prior to the issuance of any notice to appellant that the examination did not disclose any fact or facts relating to the amount in controversy and without any trial had thereon after the issuance of notice to appellant, and same is in violation of the due process of law clause of the Constitution, and the refusal of the Court of Bankruptcy to permit appellant to prove such facts alleged in its verified answer is a violation of appellant's Constitutional rights, and particularly its right to due process of law under Art. V of the Bill of Rights.

Thirteenth

Said summary order and decree herein are unlawful and unconstitutional in that said Court of Bankruptcy attempts thereby to collect for the benefit of appellee six per cent interest on a large sum of money alleged to have been paid to the American National Bank and never coming into appellant's possession, and such contractual liability for interest if any cannot be enforced by summary order and criminal process in violation of appellant's Constitutional rights, and particularly its right to due process of law under Art. V of the Bill of Rights.

Fourteenth

The refusal of said Court of Bankruptcy to permit appellant to prove:

(a) That the said Referee, who entered said summary order and filed said findings of fact had a financial interest in said recovery as alleged in appellant's sworn answer.

[fol. 105] (b) That he entered same without trial or hearing.

(c) That his findings of fact are false and the result of his said financial interest in said recovery.

(d) That said Trustee has already received full and complete satisfaction of the said debt as against the bondsmen on the said bankrupt's supersedeas bonds.

(e) That said Trustee has recovered the collateral held by the said American National Bank at the time said debt was paid by the bankrupt, as alleged under oath by appellant; violates appellant's Constitutional right to a trial and due process of law in defense of its property, as guaranteed by Art. V of the Bill of Rights.

Wherefore Appellant prays that said judgment and decree of said U. S. District Court may be in all things reversed.

W. E. Spell, J. A. Templeton, Clay Cooke, G. A. Stultz, Attorneys for Appellant.

[File endorsement omitted.]

[fols. 106 & 107] Bond on Appeal for $18,000—Approved and filed May 13, 1924; omitted in printing

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[fol. 108] Citation—In usual form, showing service on Henry Zwifel; omitted in printing

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[fol. 109] [File endorsement omitted]

[fol. 110] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed June 4, 1924

To the Clerk of said Court:

You are requested to make a transcript of the record to be filed in the United States Supreme Court, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers, to-wit:

1. Petition of Trustee against Farmers & Mechanics National Bank, filed with Referee March 26th, 1921.

2. Order of Referee to show cause dated March 28th, 1921, and return thereon.

3. Objections of Farmers & Mechanics National Bank to jurisdiction of Referee filed April 7, 1921.

4. Findings and order of Referee dated June 2nd, 1921.

5. Petition of Farmers & Mechanics National Bank for review of order of Referee filed June 11, 1921.

6. Order of District Court of Nov. 20th, 1922 affirming order of Referee.

7. Certificate of Referee of failure to pay money filed 22nd day of April, A. D. 1924.

8. Order to show cause thereon dated 23rd day of April, A. D. 1924.

9. Answer of Farmers & Mechanics National Bank filed May 2nd, 1924.

10. Decree of Court entered May 3rd, 1924.

[fol. 111] 11. Petition for rehearing filed 19th day of May, 1924.

12. Order overruling petition for rehearing.

13. Certificate of Judge.

14. Petition for appeal and allowance thereof.

15. Assignment of Errors.

16. Supersedeas bond on appeal.

17. Citation on Appeal and return thereon.

18. This Præcipe.

Said transcript to be prepared in accordance with law and the rules of said United States Supreme Court.

W. E. Spell, J. A. Templeton, Clay Cooke, G. A. Stultz.

Jurat showing the foregoing was duly sworn to by Clay Cooke omitted in printing.

[File endorsement omitted.]

[fol. 112] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINANT'S ADDITIONAL PRECIPE FOR TRANSCRIPT OF RECORD—Filed June —, 1924

To the Clerk of said Court:

On behalf of the complainant you are requested to include in the transcript, in addition to those requested by thre respondent, the following:

1st. Petition for Rehearing filed Nov. 28th, 1922.

2nd. Order of District Court overruling Motion for rehearing, May 19th,
Filed [March 10th,]* 1923.

[3rd. Petition to Superintend and Revise order of the District Court filed September 19th, 1923.]*

4th. Assignments of Error filed August 14th, 1923.

5th. Petition for appeal to Circuit Court of Appeals filed Aug.
[5th. Petition for Rehearing in Circuit Court of Appeals filed Dec. 14th, 1923 at 9.15 O'clock A. M.
15th, 1923.]*

6th. Mandate of Circuit Court of Appeals in cause No. 4206, Wilkinson vs. F. & M. Bank, filed March 28th, 1924.

7th. Trustee's Motion to Cite F. & M. Nat'l Bank and Officials for contempt. Filed April 23rd, 1924.

8th. Reply of W. W. Wilkinson, Trustee in Bankruptcy to Motion for rehearing of Farmers & Mechanics National Bank in contempt proceedings, filed May 24th, 1924.

9th. This precipe.

Respectfully, Geo. M. Conner, Capps, Cantey, Hanger & Short, Boykin & Ray, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 113] THE STATE OF TEXAS,
County of Tarrant:

H. C. Ray, being duly sworn on oath states that he delivered a true copy of the above and foregoing precipe to Clay Cooke, on the 9th day of June, 1924.

H. C. Ray.

[*Words and figures enclosed in brackets erased in copy.]

Sworn to and Subscribed before me, this the 9th day of June, 1924. Jess Tucker, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 114] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Northern District of Texas, ss:

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify and return to the claim of appeal of Farmers & Mechanics National Bank of Fort Worth, Texas, in a cause pending in said Court styled No. 1001 In Bankruptcy, wherein W. W. Wilkinson, Trustee, is plaintiff, and the said Farmers & Mechanics National Bank is defendant, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause, which are called for in the præcipe of both parties, as the same appear on file and of record in my office; except that the original citation on appeal and return thereon are included instead of a copy thereof; that I have compared the same with the original and they are true and correct transcripts therefrom.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Fort Worth, in said District, this the 20th day of June, A. D. 1924, and of the Independence of the United States the One Hundred and forty-eighth year.

Louis C. Maynard, United States District Clerk, by G. B. Buckley, Deputy. (The Seal of the U. S. District Court, Northern Dist. Tex., Fort Worth.)

Endorsed on cover: File No. 30,452. N. Texas D. C. U. S. Term No. 487. Farmers & Mechanics National Bank of Fort Worth, Texas, appellant, vs. W. W. Wilkinson, trustee, and The United States of America. Filed January 26th, 1924. File No. 30,452.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 487.

FARMERS AND MECHANICS NATIONAL BANK, of Fort Worth, Texas, Appellant,

Vs.

W. W. WILKINSON, Trustee of Walker Grain Company, Bankrupt, Appellee.

Appellant's opposition to Motion of Appellee to dismiss Appeal.

To the Honorble Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant respectfully shows, in opposition to the Motion of Appellee to dismiss this appeal:

1.

That the Supreme Court has exclusive jurisdiction of this appeal under the Judicial Code, as same involves the jurisdiction and power of the U. S. District

Court to enter the decree appealed from, and same is the sole issue certified by the U. S. District Court.

2.

The Supreme Court has jurisdiction of this Appeal because the issue raised in the U. S. District Court by appellant in its answer is that the Act of Congress does not confer on the U. S. District Court the jurisdiction, power or authority by summary order and criminal process in contempt to compel the appellant, without citation or trial, to pay over a common law debt to the Trustee in Bankruptcy alleged to have been paid to the American National Bank by the bankrupt prior to adjudication as a voidable preference, appellant's only liability being the allegation that it assumed the debts and liabilities of the American National Bank.

3.

That the exercise of any such attempted jurisdiction, even if conferred, violates the provision of the Constitution of the United States confirming to appellant the right to due process of law in defense of its property, and the provision thereof confirming to appellant the right of jury trial in all actions at common law, and the said proceeding involved in the District Court the construction and application of the Constitution of the United States.

STATEMENT.

The statement made by appellant in the Motion is

not complete and in many respects misleading. We, therefore, present herewith the true situation, as revealed by the record. We are at a disadvantage in this, the record not having been printed we are unable to give page references thereto. We, therefore, urge that such motion, which really goes to the merits of the appeal, should be submitted with the case, so that appellant may properly brief and present same.

The proceedings below were commenced by the filing by Appellee the Trustee in Bankruptcy, after the general examination of the bankrupt, a petition against appellant, **who was not a party to said bankruptcy proceedings**, said petition being filed with the Referee, wherein he alleged that the bankrupt had, while insolvent, borrowed from the American National Bank, $10,000.00, executing its note therefor; that thereafter the bankrupt paid said debt to the American National Bank after the filing of the petition in bankruptcy and prior to adjudication while insolvent and under alleged conditions constituting such payment a voidable preference; and that appellant had therefore **assumed the liabilities** of said American National Bank. (Rec. p.....)

The Appellant was summarily ordered by the referee to **show cause** why it should not be **ordered** to pay over said sum to the Trustee, and appeared before the Referee for the sole purpose of objecting to the jurisdiction of the bankruptcy court without suit, citation, trial, or other process, to summarily order it to pay over said alleged voidable preference alleged

to have been given the American National Bank (Rec. p._____)

The Referee, without acting upon said plea to the jurisdiction, and without trial or hearing, but on the evidence previously heard by him at the general examination of the bankrupt, entered a summary order directing the appellant to pay over said sum of money with interest, filing what he terms "conclusions of fact," wherein he holds that appellant was "without color of right to said money," notwithstanding the petition did not claim anything more than the right to recover an alleged voidable preference. Appellant attempted to appeal to the Circuit Court of Appeals from such order, but its appeal was dismissed on the ground that no appeal would lie from such order. It also attempted to revise said order on petition which was denied solely on the referee's findings of fact. The answer of the bank herein (Rec. p._____) shows said finding of fact to be grossly erroneous and that they were induced by the fact that the Referee's law partner was the attorney for the Trustee in said proceedings before the Referee, such relationship being unknown at that time to appellant. Therefore, the unsuccessful attempt of the appellant to appeal or revise the said original order of the referee should in no wise prejudice the issue on this appeal, which is from the final action of the Court of Bankruptcy in approving and attempting to enforce said void order.

The Court of Bankruptcy, on appellant's failure to pay over said sum of $10,210.00, ordered appellant to

show cause why it should not be punished for contempt of Court.

Appellant appeared and showed by its answer that said proceedings to compel appellant to pay over said $10,210.00 to the Appellee was summary in its nature, without suit, citation, trial, or any due process of law as guaranteed by the Constitution; that same was an attempt to collect by such summary process a common law debt alleged to be owing appellee by the American National Bank and alleged to have been assumed by appellant; that such summary process to collect such alleged debt denied to appellant the right of trial by jury thereon and violated appellant's Constitutional right to due process of law. That no such jurisdiction rested in the said Court of Bankruptcy.

The Court of Bankruptcy refused to hear any evidence and entered the decree appealed from fining appellant $10,210.00 to be collected by execution and paid to Appellee and $25.00 likewise to be collected by execution and paid one-half to appellee and one-half to the United States of America.

The proceeding constitutes (1) a suit by the appellee to collect an alleged debt at law claimed to be owing him by the American National Bank, which he alleges appellant assumed and agreed to pay; (2) a summary order to pay over the money, without citation, trial, or other process of law; (3) a decree without citation, trial, or other process of law, for the collection of the money by execution, as in an ordinary judgment of law.

The District Court of the United States is without jurisdiction to enter such decree on the proceedings here outlined. The exercise of such jurisdiction violates the most fundamental concept of due process of law.

The District Court certifies as follows:

Certificate of the Court.

At the request of the Farmers & Mechanics National Bank, respondent in the above cause, it is hereby certified that that the Farmers & Mechanics National Bank, at Fort Worth, Texas, did, by its answer, filed herein, raise the issue of the jurisdiction of this court as a court of bankruptcy, to enter a decree requiring it to pay to the trustee certain funds, and, also, by said answer raised issues alleged to involve the construction and application of the Constitution of the United States. The issues so presented to this court were decided adversely to the Farmers & Mechanics National Bank.

1st.

The bank contends that the provisions of the bankruptcy act, as amended, do not confer jurisdiction on a court of bankruptcy upon petition of the trustee, to summarily order a person, not a party to the bankrupt proceedings, to pay over to the trustee a sum of money alleged and found to have been paid to such party. In the instant case the party is a bank, and the facts show that the payment was actually made to the American National Bank, which consolidated with the Farmers & Mechanics National Bank, the com-

plaining bank, some 60 days after the payment; such complaining bank taking over all of the assets and liabilities of the original bank; and such payment being made after the filing of the petition in bankruptcy and before adjudication thereon and in satisfaction of a debt.

2nd.

It is also contended by the bank that the provisions of the bankruptcy act do not confer jurisdiction upon a court of bankruptcy to compel such payment by fine as for a contempt of court.

3rd.

Likewise, it is contended that the provisions of said bankruptcy act do not confer any such jurisdiction, and, if they do they violate the due process of law clauses and Article Seven of the Bill of Rights.

Signed. WM. H. ATWELL,
United States District Judge.

AUTHORITIES.

Bardes vs. First National Bank, 178 U. S. 524; 524 L. Ed. 1175.

Bush vs. Elliott, 202 U. S. 477; 50 L. Ed. 1114.

Spencer vs. Duplan Silk Co., 191 U. S. 526; 48 L. Ed. 287.

Jaquith vs. Rowley, 188 U. S. 620; 47 L. Ed 620.

Mueller vs. Nugent, 184 U. S. 1; 46 L. Ed 405.

Louisville Tr. Co. vs. Comingor, 184 U. S. 18; 46 L. Ed. 413.

Babbitt vs. Dutcher, 216 U. S. 102; 54 L. Ed. 402.

Weidhorn vs. Levy, 253 U. S. 272; 64 L. Ed. 898.

Galbraith vs. Valleyley, 246 U. S. 46; 65 L. Ed. 823.

And under former law:

Marshall vs. Knox, 83 U. S. 551; 21 L. Ed. 481.

Eyster vs. Goff, 91 U. S. 521.

In Louisville Trust Co. vs. Commingor this Honorable Court said:

"The proceedings was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution, but by commitment.

"We think that it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights."

The question is whether the district court had jurisdiction to finally adjudicate the merits in this proceeding.

In Weidhorn vs. Levy, this Court said:

"**We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankrupcty and such controversial**

matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration."

"Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the General Orders in Bankruptcy, a referee, by virtue of a general reference under Order XII. (1) has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under paragraph 70e, and affecting property not in the custody or control of the court of bankruptcy."

In Marshall vs. Knox, Mr. Justice Bradley says:

"We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual proceesses of the law in defense of their rights. * * * The lessor in this case was not a party to the bankrupt proceeding; and in Smith vs. Mason we held expressly that 'Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, **cannot be compelled to come into court** under a petition for a rule to show cause'."

In Eyster vs. Gaff, this Court has said:

"The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's

property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. **This court has steadily set its face against this view."**

In Bardes vs. Bank the Supreme Court says:

"Ist. The provisions of the second clause of Section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

In all the foregoing cases the sole question decided by this Honorable Court is the question of the jurisdiction of Courts of Bankruptcy to summarily without citation, trial, or the usual processes of law by order direct the citizen in possession of and claiming property or money, to turn it over to the Court's trustee, and this court has consistently denied such jurisdiction. The same question of jurisdiction is the sole question here certified. It, necessarily, as plain-

ly shown by the Court's language in the foregoing authorities, involves also the construction and application of the Constitution of the United States, because if such jurisdiction is at all exercised the citizen is deprived of his right to citation, jury trial, and the other usual processes of the law.

The cases cited in appellee's motion are clearly distinguished from this case. In all such cases the Trustee by his petition sought to recover property in possession of a third party, who it is alleged **asserted no adverse claim thereto.** In this case the very petition of the Trustee upon which the jurisdiction is invoked shows that he seeks by summary order to set aside and recover an alleged voidable preference given by the bankrupt to the American National Bank.

True, the Court of Bankruptcy as this Court has said, has jurisdiction on complaint of the Trustees that a third party is **wrongfully withholding property belonging to the estate,** to inquire whether the third party's holding is adverse. But, in the instant case, the Trustee's petition itself, upon which jurisdiction is evoked, discloses, not **that he seeks property belonging to the estate and wrongfully withheld without color of right,** but **that he seeks in a summary manner to avoid a preference and recover a debt.** The Court of Bankruptcy is clearly without jurisdiction upon such a petition in a summary manner to avoid a preference and allow recovery of a debt. This issue of jurisdiction being clearly and distinctly raised and certified, this Honorable Court has exclusive jurisdic-

tion under Sec. 238 Judicial Code to entertain the appeal.

Had the Trustee filed this character of a petition for debt at law, and decree had been entered without proper service of citation, the issue of jurisdiction to enter the decree would be directly involved and appeal would only lie direct to the Supreme Court, Chipman vs. Thos. B. Jeffrey Co., 251 U. S. 373. Then it is certainly directly put in issue where he files the same petition only styling it in the bankruptcy proceeding and gets the same judgment in a summary manner without either issuance or service of citation.

The appeal lies direct to the Supreme Court because there is involved the Construction and application of the due process of law clause of the Constitution and Art. VII of the Bill of Rights as appellant is denied a jury trial in an action at law for debt.

The Trustee's petition made the basis of the jurisdiction exercised by the Court of Bankruptcy is a suit to recover a voidable preference; it is not filed in a court of law or equity, but before the Referee, no citation is had thereon, no trial permitted, but a mere summary order is levelled at appellant and based upon this the Court of Bankruptcy enters the fine against appellant, the whole procedure being an attempt to avoid a preference and recover a money judgment without following any of the processes of the law provided therefor. To attempt to collect such debt by summary order and punishment for contempt, would violate fundamental Constitutional guaranties, and as shown by appellant's answer in the Court be-

low and by the certificate of the court, involves the construction and application of the Constitution of the United States.

This is not a proceeding in bankruptcy. No property or money of the bankrupt is involved or claimed to be involved. Appellant is not a party to the bankruptcy proceedings. It is merely claimed that appellant prior to the adjudication of the bankrupt assumed the legal liabilities of one who is alleged to have, prior to such assumption, received a voidable preference.

The Trustee's petition upon which the whole procedure is based is:

> That on or about the 1st day of January, 1919, the said Farmers & Mechanics National Bank of Fort Worth, Texas, consolidated with and succeeded the American National Bank of Fort Worth, Texas, assumed and became bound and liable to pay all the liabilities of the said American National Bank.
>
> That on July 27th, 1918, at a time when the said Walker Grain Company was hopelessly insolvent, the said American National Bank, with full knowledge of such insolvent condition of said Walker Grain Company, made a loan to the said Walker Grain Company of the sum of $10,000.00, which said loan was made for the purpose of paying off and taking up an overdraft in the account of the said Walker Grain Company with said bank. That in consideration of said loan, the said Walker Grain Company made, executed and delivered to said bank its promissory note of said date in the sum of $10,000.00, payable on de-

mand, with interest from date until paid at the rate of 8 per cent per annum. Thereafter, on or about the 9th day of October, 1918, the said Walker Grain Company paid upon said obligation the sum of $1,650.00, and thereafter on or about the 2nd day of November, 1918, said Walker Grain Company paid to said American National Bank upon said obligation the further sum of $8,560.00. That said sums of money were paid to said bank with the intention, both upon the part of the Walker Grain Company and said bank, to pay and accept said sums of money as a preference upon said obligation over and above amounts going to other creditors and with an intent to hinder, delay or defraud and defeat the other creditors of the said Walker Grain Company, and that the payment of said money was a detriment to and a disadvantage to the other creditors of the said Walker Grain Company, who holds provable claims against the said company to the extent of approximately $150,000.00.

Upon this without citation or trial the appellant not a party to said bankruptcy proceedings is summarily ordered to pay over $10,210.00 and likewise, without citation or trial, is condemned to pay a large fine for contempt of court for its failure to do so. It has interposed its objection to the jurisdiction of the Court and its claim to its Constitutional right of Jury trial and due process of law at every stage of the proceedings. It has relied upon the decisions of this Honorable Court above cited that no such jurisdiction resides in this Court of Bankruptcy.

If it should be held that the procedure here out-

lined is conformable to Constitutional rights, then the Court of Bankruptcy, without such citation or trial can summarilly collect alleged voidable preferences from any one by the mere process of styling the suit therefor in the original bankruptcy proceedings and substituting summary orders and contempt proceedings for the orderly processes of the law.

Owing to the fact that the record is not printed, and that the motion to dismiss goes to the merits of the appeal, appellant says that it is somewhat handicapped in clearly presenting its answer, therefore it would not be averse to passing motion till submission of the case so that appellant may be heard and have an opportunity to properly brief and present the case in the light of the printed record.

Appellant prays that said Motion to dismiss be overruled, or passed for submission with the case in regular order.

Respectfully submitted,

CHAS. A. BOYNTON,
W. E. SPELL,
CLAY COOKE,
J. A. TEMPLETON,
G. A. STULTZ,
Attorneys for Appellant.

We hereby certify that we have read the foregoing brief, and in our opinion same well founded in law.

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Attorneys for Appellant.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1924.

No. 487.

Farmers & Mechanics National Bank of Fort Worth, Texas, Appellant.

vs.

W. W. Wilkinson, Trustee of the Walker Grain Company, Bankrupt, Appellee.

Appellant's Motion for Leave to File and Argue Motion for Rehearing, and to Withhold Issuance of Mandate Until Action on Such Motion.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The appellant, Farmers & Mechanics National Bank of Fort Worth, Texas, files and presents herewith its motion for rehearing and respectfully prays that it be allowed to argue said motion orally before this Honorable Court, and that pending hearing and action thereon the mandate of this Honorable Court upon its decree rendered herein dismissing appellant's appeal be withheld and not issued.

Respectfully submitted,

W. E. SPELL,
CLAY COOKE,
J. A. TEMPLETON,
G. A. STULTZ,
Attorneys for Appellant.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1924.

No. 487.

Farmers & Mechanics National Bank of Fort Worth, Texas, Appellant.

vs.

W. W. Wilkinson, Trustee of the Walker Grain Company, Bankrupt, Appellee.

Appellant's Motion for Rehearing and Brief in Support Thereof.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant, Farmers & Mechanics National Bank of Fort Worth, Texas, believing that errors have been committed as hereinafter set forth, in the opinion and decree herein, dismissing appellant's appeal, respectfully prays for a rehearing herein and assigns as grounds therefor the following, to-wit:

1.

The appeal was taken direct to this Honorable Court because there is raised in the Court below issues involving the construction and application of the Constitution of the United States, and the jurisdiction of the District Court of the United States, and these issues

affect the merits of the appeal, as well as the jurisdiction of this Honorable Court to entertain same. The decision and opinion was rendered herein before appellant had been furnished with a copy of the printed record, and appellant had not the opportunity to present to this Honorable Court by argument and references to the record the actual facts and issues involved, which are thus disposed of in this Honorable Court's opniion erroneously, as appellant conceives, both as to the facts and the law applicable thereto; hence appellant respectfully prays that a rehearing be granted it and that it be permitted to present by written brief and oral argument herein the issues raised and the matters hereinafter set out wherein it conceives the opinion herein to be erroneous in matter of fact and law.

2.

This Honorable Court has erred in the Statement of Facts in its opinion in the following particulars:

(a) The $10,000.00 note executed by Walker Grain Company July 27th, 1918, was secured by collateral in excess of the amount of said note in the possession of the American National Bank, at the time it was executed long prior to the filing of the petition in bankruptcy and was not a plain demand note. The action being one for debt alleged to have arisen by the payment to the American National Bank by the bankrupt prior to bankruptcy of an unsecured indebtedness, which debt it is claimed appellant assumed, appellant's Constitutional right to a trial by jury on such controverted issues of fact is violated by permitting

the Referee to conclude same, appellant's being not a party to said bankruptcy proceedings. (Rec. p. 29).

3.

This Honorable Court errs in its statement of fact wherein it states:

> "After the petition was filed the bankrupt paid appellant the amount of the note, appellant, in the meantime, having succeeded to all the assets and rights and assumed all liabilities of the American National Bank."

The note was never paid to appellant, but was paid to the American National Bank, which surrendered the collateral to the bankrupt and same was a closed transaction long prior to the purchase of the assets of the American National Bank by Appellant, and long prior to the adjudication of bankruptcy, and no part of said money was paid to, or ever received by appellant, appellant's only claimed liability being its alleged assumption of the debt of the American National Bank. (Rec. p. 30).

The Trustee filed a petition with the Referee setting up that the payment of said money to the American National Bank was made:

> "With the intention both upon the part of the Walker Grain Company and said bank to pay and accept said sums of money as a preference upon said obligation over and above amounts going to other creditors and with an intent to hinder, delay or defraud and defeat the other creditors of the said Walker Grain Company, and that the payment of said money

> was a detriment to and a disadvantage to the other creditors of the said Walker Grain Company." (Rec. p. 2).

and sought recovery of same on the sole ground that such payment so made prior to bankruptcy was a "voidable preference" and that thereafter appellant consolidated with and assumed the liabilities of the American National Bank. (Rec. pp. 1 and 2).

The Appellant appeared before the referee **solely to object to the jurisdiction of the referee to summarily set aside such alleged voidable preference,** and enforce a purely contractural obligation against appellant even if same existed, in a summary manner. (Rec. p. 3).

The Referee, **without hearing or an opportunity to appellant to be heard, but on alleged evidence received by him at the general examination of the bankrupt held prior to the beginning of any proceeding against appellant,** entered the alleged summary order against appellant directing it to pay over said $10,000.00 to the Trustee with 6 per cent interest thereon from the dates the American National Bank received same. (Rec. pp. 32-33).

5.

Appellant sought to appeal from said order of the referee whereby the facts might be examined, but said appeal was dismissed by the Circuit Court of Appeals for the Fifth Circuit, said Court holding that no remedy by appeal existed. (295 Fed 120). Appellant sought also to revise on petition in matter of law only the summary order on the sole ground that the

referee was without jurisdiction to answer same. This petition to revise was denied by the Circuit Court of Appeals. (295 Fed. Rep. 120), but said order was not otherwise examined on appeal, and the mandate thereon of the Circuit Court of Appeals merely dismisses the appeal and denies the petition to revise in matter of law only. (Rec. p. 23).

When cited for contempt for not paying over said sum of money, appellant, having never been given a hearing on the facts prior thereto, or any appeal therefrom set up under oath the foregoing facts and the further facts that the Referee was of Counsel for the Trustee at the time he entered said order. (Rec. p 34), and raised the issues involving appellant's Constitutional right thereto:

(a) Notice before hearing or trial.

(b) Opportunity to defend.

(c) Right to be confronted by the witnesses against appellant.

(d) Right to produce witnesses in its behalf.

(e) Right to trial by jury on disputed issues of fact in an action for debt.

(f) Right to an appeal.

(g) Right to a trial before a court not financially interested.

7.

The District Court refused to hear any evidence whatever, but assessed said heavy fine, without hearing any evidence and refusing to permit appellant to introduce any evidence notwithstanding that the

bankruptcy act expressly requires such court on such certificate to "hear the evidence." before finding defendant guilty of contempt. (Rec. p. 47).

8

The issue raised in the District Court by appellant's answer that a summary order of a referee to appellant to pay over $10,000.00 to a Trustee in bankruptcy entered without a hearing or opportunity to be heard upon alleged evidence heard by the referee at a general examination of the bankrupt held **prior to the institution of any proceeding against appellant** violates the due process of law clause of the Constitution of the United States, raises an issue as to the construction and application of the Constitution of the United States, and gives this Honorable Court jurisdiction of an appeal from the decree of the District Court thereon.

9.

The issue raised by appellant's answer that the attempt of the District Court of the United States to compel by contempt proceedings the payment of a common law debt alleged to be owing by reason of a voidable preference granted by the bankrupt to the American National Bank, which debt it is claimed appellant assumed is a violation of Art. VII. of the Constitution of the United States, granting to appellant the right of trial by jury in all actions of debt at common law and raises a substantial issue as to the construction and application of the Constitution of the United States and gives appellant a statutory right to a direct appeal to this Honorable Court.

The proceeding to punish for contempt of court is a separate and distinct action criminal in its nature instituted directly in the District Court wherein the Bankruptcy Act Sec. 41b requires the District Court to hear the evidence as to the acts complained of "and the former proceeding wherein appellant in the first instance attempted to revise by petition in matter of law only the order of the Referee ought not to deprive appellant of a full hearing and its full rights upon the separate and distinct proceeding for punishment for contempt because these issues were not raised, nor appellant given an opportunity to raise same on the original proceeding before the referee. The entry of this summary order without hearing or opportunity to be heard gives rise to the very constitutional and fundamental issue raised in this proceeding, which is a separate and distinct criminal proceeding, notwithstanding the cause of action is founded upon the original summary order, and therein this proceeding is distinguishable from the authorities cited by this Honorable Court. In the authorities cited in the opinion herein the same case when revised and remanded with instructions by the Circuit Court of Appeals comes on for trial the second time this Honorable Court properly held that the decree entered in accordance with the mandate cannot be reviewed on direct appeal to this Honorable Court. **In these proceedings the proceeding for contempt is a separate and distinct suit or action,** although founded on the former order. It is made so by statute. It is more in the nature of a separate action to enforce a former judgment. If the former judgment be void because

of want of citation, notice, or trial, or lack of jurisdiction in the Court to enter it, these issues could properly be raised in a distinct suit upon the judgment, or as in this case a separate action of a criminal nature to enforce same. The Circuit Courts of Appeal for the Fifth Circuit, the First Circuit, and others have so held, and that the findings of the Referee who made the order is no sense binding upon the District Court in the proceeding for contempt.

The First Circuit in re Goodrich 25 A. R. R. 787; 184 Fed 5, held referring to the contempt hearing before the District Judge:

> "He says, in substance, that the bankrupt made no attempt to have the referee's order reviewed, and that, having declined the opportunity to have the order reviewed, he had no right to try on the present issue anything already determined by the Referee. Therefore, the Court substantially ruled out all evidence which might have been produced before the referee, and apparently all which related to the issue tried by the referee, and ruled that he would hear only evidence concerning what might have occurred after January 18, 1910, the time at which the referee's report was dated. The practical objection to these rulings upon the matter of this order in bankruptcy are especially insistent * * * The referee's order was, of course, essential, because it was the basis of any proceedings against the bankrupt. Nevertheless it lacks all the careful provisions which surround a master's report in chancery to give it effect and weight * * * It is sufficient that we apply the principle that

> **a judgment against a person in a civil case sustains none of the issues against the same person** in criminal proceedings. In the present instance the order reported by the referee, and whatever occurred before him, may, under the liberal rules we have stated, in re Cole, be referred to as having some weight pro and con, this cannot be accepted as justifying the District Court from failing to revise, on a proceeding like this, the question involved with an open mind. **The Court was holden to receive all material proofs relating to what preceded the referee's report, as well as to what followed it. Therefore, for this reason alone, the case must be recommitted for further proceedings in that court.**

The Honorable Circuit Court of Appeals for the Fifth Circuit in a very able and exhaustive opinion by Shelby, C. J. in Stewart vs. Reynolds, 29 A. B. R. 415, reaches the same conclusion in effect that the rules of evidence governing proceedings for contempt are those applicable to criminal and not civil cases.

The Eighth Circuit Court of Appeals, in re Rosser, 4 A. B. R. 153, 101 Fed. 562, which was a proceeding like this to punish as for contempt one who failed to turn over money to a trustee in compliance with an order of a referee, says:

> "A more serious question is presented by the contention of the bankrupt, that the proceedings in the Court below did not give him much notice of, and such an opportunity to be heard upon the propriety of the order of the payment of this money as constitute due process of law. Chancellor Kent says: "The better and larger

definition of 'due process of law' is that it means law in its regular administration through courts of justice," 2 Kent, Comm. 13. While it is perhaps impossible, and is certainly unwise, to attempt to give a concise and comprehensive definition of the terms 'due process of law' and 'law of the land,' it is certain that notice to the party to be affected of the claim against him, and an opportunity to be heard upon it, are essential elements of every proceeding in a court of justice which can be said to constitute due process of law or to be in accord with the law of the land. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By "law of the land" is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.' Colley Const. Lim. 431. The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property without due process of law, without a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the clai magainst him, and of the relief sought from the court if the claims are sus-

tained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his cousel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principles of our laws, and cannot be sustained.

"The claim against the bankrupt, upon which the order for his payment of the $2,500.00 is based, was that this money was a part of his estate, and that he had the possession and control of it on July 20, 1899, when the referee made the order upon him to pay it to the trustee. Under the principle to which reference has been made, he was entitled to a citation or notice of a hearing upon this claim and of the proposed order before it was made.

"It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded. Gentry V U. S. (C. C. A.) 101 Fed. 51 In the case in hand no notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the $2,500.00 in controversy before the order to that effect was made.

"He was cited to appear and be examined under section 21 of the Bankruptcy Act, and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the $2,500.00, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involves. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

The identical question raised here was decided in re Soloway v. Katz, 28 A. B. R. 225; 195 Fed. 103.

The Court says:

"The statutory creditors' meeting was in progress, and the prove was being applied by counsel for the trustee, to fathom the depths of the depravity into which those on the surface have aright to think the bankrupts had descended. Suddenly, acting for the trustee, he

launched against the bankrupts a petition asking that certain books and papers, which would be useful and perhaps essential, in an endeavor to uncover and discover the details of the bankruptcy, be delivered over.

"The petition demonstrates a laudable effort on the part of the trustee to get books and papers which he needs, in order that he may properly perform his duties as an officer of the court and the representative of the creditors, and so far as I am now advised, if, after a lawful hearing upon a petition properly brought for such purpose, the referee, putting aside all that has passed before, shall be of the opinion which he now holds, but which was gained in an irregular way, it will be his duty to issue an order for their production. Such an order, if not obeyed, would, when brought to my attention, for a solid basis upon which I would be authorized to insist that the bankrupts should satisfy me beyond a reasonable doubt that neither of them was able to comply with the order. Then, and only then, could I be in a position to deal with them lawfully. The trouble with the case as it now stands is that the bankrupts have had no day in court at all upon the issues which the petition presents, or granting the last ounce of concession to the views of the referee, no such day in court as would furnish him the power to issue the order which is under review.

"The referee admits in his certificate that, in the face of the bankrupts' denial of power to produce, he has, in reaching the opinion that they can produce if they wish to do so, been influenced by all the facts and circumstances

> which have come to his knowledge during the creditors' meeting."

The same identical situation is disclosed in this case; after the general examination of the bankrupt, the Trustee launches his petition against the bank and it is ordered to show cause, it appears solely for the purpose of objecting to the referee's jurisdiction; the referee without acting on or having any further hearing launches his order against the bank accompanied by findings that he derived at the general examination of the bankrupt held prior to his notice to the bank.

If it be true, as alleged by petitioner under oath as true, and not denied, that the referee entered the alleged order, without trial, upon a hearing had before the Trustee's petition against the bank was filed, before notice to the bank, and that after such petition and notice no hearing was held thereon, the order is an unlawful order and cannot and indeed should not be enforced. Why shut the doors to inquiry? The bank was ordered to show cause why it should not be held in contempt, it appeared and under oath showed that the order was unlawful, because entered without hearing or opportunity to be heard. The Court refused to hear any evidence on this or any other issue. This procedure is tersely described and emphatically condemned by Mr. Justice Field in Windsor vs. McVeigh, 93 U. S. 277, as follows:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a

> principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted. Until notice is given the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject matter."

It may be asked why these issues were not raised on the former petition to revise the original summary order of the referee. An attempt was made to do so by appeal, but the Circuit Court of Appeals dismissed the appeal, holding that no appeal would lie from such an order. On the petition to revise, the Circuit Court of Appeals was limited in its jurisdiction to a question of law as to the Referee's jurisdiction on the facts found by him to enter this order. The effect is (first) to deny appellant a hearing on the issues raised before the referee,; (second) to deny appellant an appeal from the findings entered without a hearing, and (third) on the separate criminal proceedings to preclude appellant from showing the invalidity of the order of the referee, as being without due process of law, and (fourth) denying any appeal from this latter judgment. The result is that appellant is deprived of its $10,000.00 with interest, without any trial at any time ,and without any ap-

peal at any time, because if it cannot appeal direct to this Court it can only go to the Circuit Court of Appeals by another petition to revise in matter of law only where no review of the facts can be had.

The holding of petitioner guilty in a criminal proceeding for contempt without any evidence of guilt on behalf of complainant, and the refusal of the District Court to hear any evidence on behalf of petitioner, and the assessing of a large fine on alleged "judicial knowledge," violates fundamental and Constitutional rights.

The complainant and the court on the hearing of the contempt charge, took the attitude that no evidence could be heard; that the bank was precluded by the referee's order from defending, and therefore the complainant offered no evidence, the bank asked to be permitted to prove the allegations of its answer, but the court refused to hear any evidence and entered the three fines on alleged "judicial knowledge" of prior proceedings. (Rec. p. 47.)

The affirmative defenses set forth by the bank in its answer, other than the general denial were:

1. That the referee's order was unlawful because entered upon evidence heard at the general examination of the bankrupt without notice to the bank prior to such hearing, and which hearing was had prior to the filing of any petition against the bank. (Rec. p. 33).

2. That the referee's order was unlawful because the referee was, in the very proceeding in which said

order was entered, the attorney for said Trustee and financially interested therein. (Rec. p. 34).

3. That said order was procured on false and fraudulent representations by the Trustee to the effect that the note due the American National Bank in payment of which the bankrupt paid said sums to said bank was unsecured, whereas same was a secured indebtedness (Rec. p. 34), and that the Trustee has recovered the said collateral so held by said bank. (Rec. p. 35).

4. That the referee filed false conclusions of fact to support his order set out in detail heretofore. (Rec. pp. 20 to 30).

5. That appellant never received either from the bankrupt, or the American National Bank said $10,000.00 and never came into possession thereof. (Rec. p. 30).

Under the authorities heretofore cited, the punishment of petitioner without trial or hearing is unlawful and void. The court in this trial was not bound by the referee's findings in making the original order, nor was petitioner precluded thereby. It had a right to be heard. The Bankrupt Act itself, Section 41, requires the Judge to "hear the evidence."

Judge Sessions in re Harding 193 Fed. 168, disposes of the question in the following terse language:

> "To hold that the investigation by this court of respondent's guilt, or innocence, must begin where that of the referee terminated, is to deprive this court of the discretion vested in it

by the law, and to confer upon the referee the power to do indirectly that which he can not do directly."

These decisions apply the principles of our Constitution that no person shall be deprived of life, liberty or property except by due process of law, and such due process requires a trial at which the defendant is heard in his defense and has the opportunity to cross examine witnesses before the very tribunal which is called upon to pass upon his innocence or guilt. To hold the Court bound by the referee's findings is to exalt the referee above the court, and certainly does not comply with Sec. 41b which requires the judge to "hear the evidence," nor is it consistent with Constitutional limitations construed by the foregoing decisions.

That the entire proceeding is beyond any lawful jurisdiction of the Court of Bankruptcy, and violates fundamental Constitutional guaranties is clearly established by the following decisions of this Honorable Court, to-wit:

Louisville Trust Company vs. Commingor, 184 U. S. 18, 46 L. Ed. 413.

Jacquith vs. Rowley, 188 U. S. 620; 47 L. Ed. 620.

Babbitt vs. Dutcher, 216 U. S. 102; 54 L. Ed. 402.

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Marshall vs. Knox, 83 U. S. 55; 21 L. Ed. 481.
Eyster vs. Gaff, 91 U. S. 521.

These opinions of the Supreme Court so completely, positively and effectually deny to the court of bankruptcy the summary jurisdiction here attempted to be exercised that no argument is necessary. The question is settled by these decisions.

By a long line of decisions; without interruption beginning with Marshall vs. Knox, 14 Wall 419, and ending with Galbraith vs. Valleyley, 256 U. S. 46, the Supreme Court, as stated by itself in Eyester vs. Gaff, "has steadily set its face against the view" that such summary jurisdiction exists, and we assert that there is not one single decision of that court since its creation which has held that summary jurisdiction exists to order in parties, not parties to the proceedings, and take property claimed by them out of their possession.

Hence the issue involves the most vital and fundamental Constitutional rights. The question whether this Honorable Court has the jurisdiction to entertain this appeal, under the decisions cited in the opinion depends primarily on whether the criminal action for contempt is a distinct proceeding and not a mere retrial of the same cause in which the former petition to revise was filed. That it is a separate and distinct proceeding is settled by the foregoing decisions of the Circuit Court of Appeals. These courts have held that in the criminal proceeding for contempt the court is in no sense bound by the prior order or finding of the Referee. It is criminal, whereas the for-

mer was civil; it is instituted in a different tribunal. The court is not in any sense bound by the former order of the referee in the trial of the contempt charge. The procedure, rules of evidence, and judgment are criminal and not civil. They are indeed based or founded upon the referee's order in the same sense that a distinct suit or proceeding in law or equity may be based upon a former judgment or decree, and may be instituted for the purpose of enforcing the former judgment, or decree, or obtaining the fruits thereof, but being a separate and distinct proceeding, the right of the defendant to raise therein a Constitutional or jurisdictional issue it would seem inheres in the very nature of the proceeding as a separate and distinct suit or proceeding; and if defendant have the right to raise such an issue as a defense to the charge of contempt, then it must follow that this Honorable Court is charged with the duty by Statute of entertaining a direct appeal for the protection of vital Constitutional rights and issues so raised.

We respectfully urge our belief that this case is distinguishable from the cases cited in the opinion; that the matter involved has not been directly passed upon by this Honorable Court heretofore, and that a rehearing whereby appellant may present more fully by argument and brief its position ought to be granted. If we err in this, however, we believe that the **Appeal should not be dismissed but should be by order transferred to the Honorable Circuit Court of Appeals for the Fifth Circuit as required by Section 238 —a Judicial Code.**

Appellant has taken no appeal to the Circuit Court

of Appeals, but as a precautionary measure filed in that Court a petition to revise in matter of law only under Section 24b of the Bankruptcy Act. This right and remedy, however, is more restricted than the right of appeal, and does not carry the right of supersedeas, and the right to review the facts, such as an appeal gives, and therefore, appellant urges, in any event, that the order dismissing its appeal be set aside and, if no rehearing is deemed desirable, its said appeal be transferred to the said Circuit Court of Appeals in accordance with the provisions of Section 238—a Judicial Code.

Appellant, since preparing this motion, has just received the information that the Honorable Circuit Court of Appeals for the Fifth Circuit has denied appellant's petition to revise in matter of law its conviction for contempt. Appellant is preparing and will, as soon as possible, file in this Honorable Court a petition for writ of certiorari to the said Circuit Court of Appeals to bring before this Honorable Court the issues raised by said petition to revise. In view of this condition of the case and of the fact that appellant has no right of supersedeas pending hearing on said petition to superintendent and revise and the application for the certiorari therefrom, appellant respectfully prays that hearing on this motion be postponed and consolidated with the hearing upon appellant's proposed application for the writ of certiorari in order that this Honorable Court may pass upon the entire matter at the same time and with full and un-

doubted right to grant whatever relief to appellant the facts and law may seem to justify.

Respectfully submitted,

W. E. SPELL,
J. A. TEMPLETON,
CLAY COOKE,
G. A. STULTZ,
Attorneys for Appellant.

J. WALTER COCKE, of Counsel.

I the undersigned solicitor and counsel for the appellant for a rehearing, do hereby certify that the foregoing application is made in good faith; that it is not made for the purpose of delay, and that, in my opinion, said petition is well founded in law.

.....

Solicitor and Counsel for Appellant.

NOTICE TO COUNSEL OF APPLICATION FOR REHEARING.

To W. W. Wilkinson, Trustee, or George M. Conner, Stanley Boykin, H. C. Ray, his attorneys of record.

Please take notice that the appellant herein will on Monday, the 2nd day of February, 1925, submit to the Supreme Court of the United States at a session thereof in the City of Washington, D. C., its motion for rehearing, herein a true copy of which is herewith served with this notice.

W. E. SPELL,
J. A. TEMPLETON,
CLAY COOKE,
G. A. STULTZ,
Attorneys for Appellant.

J. WALTER COCKE, of Counsel.

State of Texas,
County of Tarrant.

W. L. Carr, being duly sworn on oath, states that on the.....day of January, 1925, he delivered .....of counsel for appellee herein a true copy of the above and foregoing notice together with a true copy of the Motion for rehearing therein mentioned.

.....

Subscribed and sworn to before me this..... day of January, 1925.

.....

Notary Public, Tarrant County, Texas.

My Commission expires May 31st, 1925.

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1924.

No. 487

FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS,
Appellant,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT,
Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now W. W. Wilkinson, Trustee of the Walker Grain Company, bankrupt, appellee herein, by his counsel, and respectfully moves the Court to dismiss with costs the appeal taken herein by the above named Farmers & Mechanics National Bank of Fort Worth, Texas, or to affirm said cause with damages for delay; and as grounds of said motion respectfully represents to the Court:

I.

THAT THIS HONORABLE COURT HAS NO JURISDICTION OF THIS APPEAL.

II.

IT IS MANIFEST THAT THE APPEAL WAS TAKEN FOR DELAY ONLY AND THAT THE QUESTIONS UPON WHICH THE DECISION OF THE CAUSE DEPEND ARE SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

PREFATORY STATEMENT.

This is a direct appeal to this Court from a decree of the District Court for the Northern District of Texas, sitting in Bankruptcy, assessing a fine as for contempt of court upon the appellant bank for refusing to comply with a summary order formerly made by the Bankruptcy Court requiring the bank to restore certain funds to the trustee in bankruptcy, transferred to appellant after the filing of the petition in bankruptcy, which former order had been affirmed by the Circuit Court of Appeals for the Fifth Circuit, and petition for certiorari to said Court denied by this Court. The certificate of the District Court allowing this appeal certifies not only the jurisdictional question claimed to be involved in respect to the entry of the contempt order; but raises as well alleged matters of defense to the former order, based upon issues of fact and refers to the entire record of the proceedings relative to the former order, as well as the record in the instant case. It is further contended by appellant that the making of the summary order in the first instance and the subsequent attempt to enforce it by assessing a penalty for contempt, deprived appellant of its constitutional right to a trial by jury, and would constitute a taking of its property without due process of law.

FIRST GROUND IN SUPPORT OF MOTION.

The District Court of the United States, as a court of bankruptcy, had jurisdiction to make the summary order

requiring the appellant to restore certain funds to the trustee in bankruptcy, which the Court found to be assets of the bankrupt estate; and also had jurisdiction to assess a fine for contempt of court against appellant for its refusal to comply with said order. Wherefore this appeal does not involve the jurisdiction of a court of the United States as such.

SECOND GROUND IN SUPPORT OF MOTION.

The propriety of this appeal should be considered only as to the jurisdictional question (if any) arising in the particular case before the court—which was a decree imposing a fine for contempt of court; and alleged defenses to the former order, which had passed to final judgment, should not have been certified.

THIRD GROUND IN SUPPORT OF MOTION.

The question of the jurisdiction of the Referee in bankruptcy and the bankruptcy court to make the summary order in the first instance was upheld by the Circuit Court of Appeals upon a review of the question, and petition of certiorari was denied therein by this Court. Wherefore this appeal is in part an attempt to have this Honorable Court pass upon questions heretofore properly presented and adjudicated.

FOURTH GROUND IN SUPPORT OF MOTION.

The District Court overruled the plea to the jurisdiction of the court, passed upon the merits of the case, and has certified not only the jurisdictional question attempted to be raised but has certified the whole case upon its merits, together with the record thereof, which would require an analysis of such record by this Honorable Court, and a decision upon the facts.

FIFTH GROUND IN SUPPORT OF MOTION.

This appeal is sought to be justified also upon the ground that the entry of the summary order in the first instance and the attempt to enforce it by assessing a penalty for contempt, deprived the appellant of its constitutional right to a trial by jury; and constituted a taking of its property without due process of law. In the premises these questions are frivolous, do not require argument, and are clearly raised for the purpose of delay only.

PRAYER.

WHEREFORE, appellee respectfully moves the Court to dismiss said appeal with costs, or to affirm the decree of the District Court herein, and assess against appellant damages for delay.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Atorneys for Appellee.

Mark McMahon

Fort Worth, Texas.

ORESTES MITCHELL,
of St. Joseph, Mo.,
Of Counsel

STATEMENT OF THE CASE.

On July 27th, 1918, the Walker Grain Company, a corporation which afterwards became the bankrupt, borrowed from the American National Bank of Fort Worth, Texas, ten thousand dollars, ($10,000.00) for which it executed to the bank its demand note. On August 16th, 1918, a petition in bankruptcy was filed against the Walker Grain Company, and it was thereafter adjudicated a bankrupt as of that date.

In November, 1918, after the petition in bankruptcy had been filed the bankrupt paid the principal and interest of said note to said bank.

About the first of January following, the said American National Bank consolidated with and was taken over by the appellant herein, the Farmers & Mechanics National Bank, and the combined banks were thereafter known as the Farmers & Mechanics National Bank. According to the findings of fact of the Referee in bankruptcy, which were approved by the District Court, the appellant bank took over all the assets of the American Bank and became responsible for all its liabilities.

Upon the appointment of a trustee in bankruptcy, the appellee herein, he filed a motion before the Referee setting up the aforesaid facts and praying that the appellant bank be required summarily to restore to him such trustee the amount of said payment.

The appellant bank, upon due notice, appeared and answered to the motion, pleading specially that the Referee had no jurisdiction in the premises and that the trustee should be required to proceed by a plenary suit where a trial by jury might be had. It was not contended that such suit would have to be instituted in a state court. In its answer the bank also pleaded to the merits, setting forth, among other things, that the said note was secured

by property of the bankrupt and that the payee bank was entitled to a priority of payment.

The Referee heard evidence and found as a fact that the note was in no manner secured by any property of the bankrupt, but was secured only by liberty bonds which were registered in the name of J. L. Walker, the president of the bankrupt corporation, and claimed by him to be his individual property, and that said bonds were thereafter surrendered by said bank to said Walker who took them to his own use and benefit.

The Referee concluded that the bank had no color of right to said moneys so paid after the jurisdiction of the bankruptcy court had attached to the bankrupt estate by the filing of the petition in bankruptcy, and entered an order requiring the bank to pay the money to the Trustee.

On review to the District Court the findings and conclusions of the Referee were approved and an order of the District Court entered to like effect.

From the order of the District Court the bank took an appeal and also filed a petition to superintend and revise to the Circuit Court of Appeals for the Fifth Circuit. In both proceedings the points were raised respecting the summary jurisdiction of the Referee, and that the proceedings violated the bank's constitutional right to trial by jury, and constituted a taking of its property without the process of law.

The Circuit Court of Appeals affirmed the order of the Referee and of the District Court. In Re Walker Grain Company, Farmers & Mechanics National Bank vs. Wilkinson, 295 Fed. 120.

To correct this opinion and decision the bank filed a petition for certiorari to this Honorable Court. In this petition the bank raised the question of jurisdiction of

the Referee to make the order, and also the question of its right to trial by a jury and made the contention that the order had the effect of taking its property without due process of law. This petition was denied. See docket of this Court, Farmers & Mechanics Natl. Bank vs. Wilkinson, No. 828, Oct. term, 1923. (68 L. Ed. 388, adv. op.)

Upon the denial of the petition for certiorari the mandate of the Circuit Court of Appeals was returned to the District Court. The Referee ordered the bank to comply with the mandate, and upon the bank's refusal to do so, certified the matter to the District Court for appropriate action. At the same time the Trustee filed a motion to the District Court praying that the bank be compelled to comply with the mandate.

Upon due notice to the bank the District Court heard the matter as presented by the certificate of the Referee and the motion of the Trustee. The bank appeared and filed a lengthy answer with affidavits of the president and cashier, respectively, of the bank, attached. In its answer the bank reiterated the defenses that it had originally urged before the Referee and the District Court when the order was first made, and in addition thereto, for the first time in any of the proceedings, set up that the pleadings of the Trustee and the evidence before the Referee on the original hearing did not justify the findings of fact that the appellant bank consolidated with the American National Bank, took over its assets and became responsible for its liabilities. The affidavits of the officers of the bank, above mentioned stated in substance that the appellant bank did not receive the particular fund that was paid over to the American National Bank by the bankrupt, but admitted that the appellant bank absorbed the American Bank and came into possession of all of its assets. Upon the issue thus tendered the District Court found adversely to the appellant bank and rendered the following decree:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS,
AT FORT WORTH.

In Re:
Walker Grain Company, No. 1001 In Bankruptcy.
Bankrupt.

In the Matter of Show Cause Order against the Farmers & Mechanics National Bank of Fort Worth, Texas.

On this 3rd day of May, A. D. 1924, there coming on to be heard after due and proper notice, an order to the Farmers and Mechanics National Bank of Fort Worth, Texas, to show cause why it should not be adjudged in contempt of Court for refusing to comply with an order heretofore made by the referee in bankruptcy directing said bank to pay unto W. W. Wilkinson, Trustee in Bankruptcy of the Walker Grain Company, the sum of $1650.00 with interest thereon at the rate of six per cent per annum from October 11th, 1918, to this date, and the sum of $8560.00 with interest thereon at the rate of six per cent from the 2nd day of November, 1918, to this date.

And all parties being present before the Court by representative and by counsel, and the Court having heard the answer of the respondent bank, and the motion to strike out said answer presented by the petitioner and trustee in bankruptcy, the Court is of the opinion that the motion to strike out said answer should be and the same is hereby overruled. The said bank thereupon offered to prove each and all of the allegations contained in its said answer, which the Court denied, and to which ruling of the said Court the said bank then and there excepted.

The Court being advised of the answer and taking judicial knowledge of the proceedings heretofore had, in this Court and in the Honorable Circuit Court of Appeals for the Fifth Circuit in which said summary order has been considered, is of the opinion that the said bank is in contempt of Court in refusing to comply with said order.

It is therefore ordered, adjudged and decreed by the Court that that the said Farmers and Mechanics National Bank of Fort Worth, Texas, a National banking corporation, be and the same hereby is fined the said sums enumerated with interest thereon as heretofore enumerated; the amount of said fine to be payable to the trustee in bankruptcy and to be collected by execution and the amount of said fine or any part thereof so collected to be applied in satisfaction of the said summary order. In addition thereto for its contumacious behaviour in this respect the said bank is fined the additional sum of $2500.00, one half of which shall be payable to the government of the United States, and one-half to the said trustee in bankruptcy.

That the said last named amount shall also be collectable by execution.

It is further ordered that all costs of this proceeding be taxed against said bank.

It is further ordered that the aforesaid executions be stayed for a period of twenty (20) days from this date.

To all of which judgment and decree of the Court the said bank then and there in open Court excepted.

(Signed) Wm. H. Atwell,
United States District Judge.

Filed 3d day of May, 1924."

From which decree of the Court, upon certificate made by the Court, this appeal is prosecuted. *The appellant*

has also taken herein a petition to superintend and revise to the Circuit Court of Appeals for the Fifth Circuit, the same being cause No. 4378 on the docket of said Court, a certified copy of the record in said appeal being filed with this motion.

ARGUMENT.

The FIRST GROUND of the motion to dismiss is that the bankruptcy court, acting through its referee, had jurisdiction to enter the summary order; and that subsequently the bankruptcy court had jurisdiction to assess a fine as for contempt of court against appellant for its refusal to comply with it, and that the jurisdiction of a court of the United States, as such, is not in issue.

While it may be beside the point to argue that the bankruptcy court had jurisdiction to enter the summary order against appellant as that matter has been finally determined by the Circuit Court of Appeals and this Honorable Court in this case; yet we will call attention to a well-settled line of authorities on this question, namely:

Mueller vs. Nugent, 184 U. S. 1; 48 L. Ed. 405.

Louisville Trust Company v. Cominger, 184 U. S. 18, 46 L. Ed. 413.

Taubel-Scott-Kitzmiller Co. vs. Fox Adv Op., May 1, 1924, page 415; 68 L. Ed. 415.

In the case of Mueller vs. Nugent, supra, certain moneys claimed by the trustee in bankruptcy, Mueller, to belong to the bankrupt estate, came into the possession of Nugent, a brother of the bankrupt, **prior** to the filing of the petition in bankruptcy. A rule to show cause why he should not summarily pay over the money to the trustee was entered against Nugent by the referee in bankruptcy. Nugent appeared and claimed the money as his individual property. The referee entered a turn-over order against him, which he refused to obey, and the bankruptcy court ordered him imprisoned until he obeyed the order.

It will be noted that in this case the transfer of the moneys was made to Nugent before the petition in bankruptcy was filed, and not after the filing of such petition, as in the instant case. Yet the Court said in passing upon the matter upon certiorari:

> "We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases much of the judicial authority of that court. By petition for review that matter can be carried to the bankruptcy court, and the entire record and findings laid before that tribunal, as was done here.
>
> And if the order of October 16th was in itself a lawful order, the power of the District Court to commit William T. Nugent until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under the express provisions of the bankruptcy act in that behalf, as well as the general jurisdiction of the court to enforce its order in the collection of assets."

But it is claimed by the appellant bank in the instant case, that it was an adverse claimant of the fund in question, and that the assertion of such claim deprived the referee of all jurisdiction to entertain the matter, and that the trustee should have resorted to a plenary suit. This contention is fully answered by the Court in the case last above quoted, as follows:

> "But suppose that the respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while

> its conclusion might have been that an adverse claim, not merely colorable, but real even through fraudulent and voidable, existed in fact, and so that it must decline finally to adjudicate upon the merits. **If it erred in its ruling either way its action would be subject to review."**

Which was precisely the case at bar. The referee decided that the appellant bank had no "color of right" to the fund in question transferred to it after the filing of the petition in bankruptcy.

It is now settled beyond controversy, by the decisions of this Court, that the filing of the petition in bankruptcy places all property of the bankrupt potentially in the custody of the bankruptcy court, and no one to whom the property is transferred after that time can be an adverse claimant thereof so as to divest the bankruptcy court through its referee of the power to enter a summary order to compel the surrender of the property.

Acme Harvester Co. vs. Beekman, 222 U. S. 300; 32 Sup Ct. 96; 56 L. Ed. 208.

Everett vs. Judson, 228 U. S. 474; Sup Ct. 568, 57 L. Ed. 927.

Bailey vs. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50; 60 L. Ed. 275.

The Circuit Court of Appeals in the case at bar, following the last above cited cases held the same thing, saying in its opinion: In Re Walker Grain Co., Farmers & Mechanics National Bank vs. Wilkinson, 295 Fed. 120:

> "We understand it to be well settled that, as to the bankrupt's property, the hands of the bankrupt and of his creditors are stayed from the date of the filing of the bankruptcy petition, and that his estate then passes actually or potentially into the control of the bankruptcy court. Acme Harvester Co. vs. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett

vs. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927; 46 L. R. A. (N. S.) 154; Bailey vs Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. *There is no color of right in the bank to retain money received by it from the bankrupt under the circumstances disclosed by the referee's findings, and the payment to the trustee of the amount so acquired, with interest thereon, may be required by an order in a summary proceeding.* Reed vs. Barnett National Bank, 250 Fed. 983, 163 C. C. A. 233. (Italics ours).

As to the contention that some of the referree's material findings were unsupported by evidence, it is enough to say that the record does not sustain that contention. We are not of opinion that the power of the bankruptcy court to make the order in question was affected or impaired by the circumstances that the above mentioned supersedeas bonds were given, that the sureties on those bonds are liable to the trustee for the amount paid to the bank as above stated, and that there is a pending suit by the trustee to enforce such liability. The bank, which is not a party to any of those bonds, is not entitled to defeat the remedy available against it by reason of the fact that the trustee had, and was seeking to enforce, other remedies against strangers to the bank. It was not disclosed that the trustee has received from any source any part of the amount obtained by the bank above stated." (Italics ours).

In the case of Taubel-Scott-Kitzmiller Co., supra, this court reviews and affirms the decisions above quoted.

That under such circumstances there is no question raised involving the jurisdiction of a court of the United States as such is supported by the following decisions:

Schweer vs. Brown, 195 U. S. 171, 49 L. Ed. 144.

Courtney vs. Pradt, 196 U. S. 89, 49 L. Ed. 398.

Lucius vs. Cawthorn-Coleman Co., 196 U. S. 149, 49 L. Ed. 425.

Bein vs. Robertson, 208 U. S. 424, 52 L. Ed. 556.

Louisville Trust Co. vs. Knott, 191 U. S. 224, 48 L. Ed. 159.

We beg to quote the short opinion in Schweer vs. Brown, supra:

> THE CHIEF JUSTICE: This was a summary proceeding in the district court of the United States for the eastern district of Arkansas, in bankruptcy, requiring the payment to the trustee in bankruptcy of the sum of $2000.00 as part of the assets of the bankrupt's estate. In return to a rule, one of the respondents alleged that he had paid the money over to the other, and denied the jurisdiction of the court. The other, Mrs. Schweer, denied that she had or ever had had any money belonging or due the estate, and denied jurisdiction. The matter was heard before a referee, who made findings of fact and conclusions of law, and ordered the return of the money. It was then carried to the district court and there heard de novo. The district court sustained the referee, and entered decree for the payment of the money to the trustee. Thereupon an appeal was taken directly to this court on the ground that the case fell within the first of the classes of cases enumerated in sec. 5 of the judiciary act of March 3, 1891, (26 Stat at L. 827, chap. 517, W. S. Comp. Stat. 1901, p. 549). But that class only includes cases where the question is as to the jurisdiction of courts of the United States as such, and the question has to be certified. That was not the question raised here, and none such was certified. *And it is settled that the district court had jurisdiction to determine whether any adverse claim to the money was asserted at the time the petition was filed.* Mueller vs. Nugent, 184 U. S. 1, 46 L. Ed.

405, 22 Sup. Ct. Rep. 269; Louisville Trust Co. vs. Comingor, 184 U. S. 18, 46 L. Ed. 413, 22 Sup. Ct. Rep. 293. (Italics ours).

If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the circuit court of appeals, under 24b of the bankruptcy law (30 Stat. at L. 553, chap. 541, U. S. Comp. 1901, p. 3432). Holden vs. Stratton, 191 W. S. 115, 48 L. Ed. 116, 24 Sup. Ct. Rep. 45.

Appeal dismissed."

The point raised in the SECOND GROUND in support of the motion is that the court should have certified only the jurisdictional question claimed to have been involved in the order from which the appeal was taken; and that it was improper to certify to this Honorable Court for determination any alleged matters of defense going to the validity of the original order.

Carey vs. Houston & Texas Central Ry. 150 U. S. 170, 37 L. Ed. 1041.

Stevirmac vs. Dittman, 245 U. S. 210, 62 L. Ed. 248.

In the case of Carey vs. Houston Texas Central Ry., supra, the Court said

"The fifth section of the Act of March 3, 1891, does not authorize a direct appeal to this court in a suit involving the jurisdiction of the circuit court over another suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it, and duly certified justifies an appeal to this court. This suit to impeach the decree of May 4, 1888, and to prevent the alleged plan of reorganization, was a separate and distinct case so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property, and no question of jurisdiction over the fore-

closure suit and the rendition of the decree passed therein can be availed of to sustain the present appeal in this proceeding."

It has been held by the Circuit Court of Appeals in several of the circuits that on a contempt proceeding for refusal to comply with an order of the court, the court will not consider any defenses which were raised to the original order, or could have been raised thereto; but will consider only the present ability of the alleged contemnor to comply with the order.

In Re Lans (2nd Cir.) 158 Fed. 610, 85 C. C. A. 432.
In Re Home Discount Co., 147 Fed. 538 (D. C. Ala.)
Frederick vs. Silverman (3rd Cir.) 250 Fed. 75, 162 C. C. A. 247.
In Re Strobel (D. C. N. Y.) 163 Fed. 380.

The holdings are well summed up by Judge Lacombe in the case of In Re Lans, supra:

"Having failed to secure a review of the order of Dec. 14, 1906, which found that the bankrupt was concealing property and directing him to turn it over to the trustee, he is in no position to question its propriety upon this petition, which brings up only the order adjudging him to be in contempt for failure to comply with the provisions of said order of December 14th."

The THIRD GROUND of the motion, as presented, raises the point that the validity of the original order requiring the restoration of the funds was passed upon by the Honorable Circuit Court of Appeals for the Fifth Circuit on petition to superintend and revise and the constitutional and jurisdictional questions here presented were decided adversely to the appellant. A petition for writ of certiorari was denied therein by this Honorable Court, and said matters have been finally determined. (68 L. Ed. 388).

Ohio Ex Rel Seney vs. Swift & Co., 260 U. S. 146, 67 L. Ed. 176.

Brown vs. Alton Water Company, 222 U. S. 323, 56 L. Ed. 221.

Carter vs. Roberts, 177 U. S. 495, 44 L. Ed. 861.

In the case of Seney vs. Swift & Co., supra, Your Honors said:

> "And we accordingly hold that whenever the suitor might have come here directly from the district court upon the sole question which he chose to controvert in the Circuit Court of Appeals, the judgment of the latter becomes final and we cannot entertain an appeal therefrom."

And the head note in Brown vs. Alton Water Co., supra:

> "A direct appeal will not lie to the Federal Supreme Court under the act of March 3, 1891, to review, as presenting a question of jurisdiction, a decree of the Circuit Court entered pursuant to the mandate of a circuit court of appeals, which had reversed a decree of that court dismissing such bill for want of jurisdiction, since there was an opportunity afforded by the statute to obtain a review of the jurisdictional question in the Supreme Court, either upon a certificate of the circuit court of appeals, or on writ of certiorari to that court."

The Court said in Carter vs. Roberts, supra:

> "The case before us * * * has been regularly heard and gone to judgment in the circuit court of appeals and an application duly made to this court for certiorari has been denied. These prior proceedings cannot be ignored and the cause brought here as if they had not been had."
>
> "When cases arise which are controlled by construction or application of the Constitution of the United States, a direct appeal lies to this court, and

if such cases are carried to the Circuit Courts of Appeal, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. (Citing cases). But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the Act of March 3, 1891."

The FOURTH GROUND of the motion presents the question whether this Honorable Court, upon a certificate of the court below allowing a direct appeal to this Court, will consider in any manner the merits of the cause, or will confine its consideration to the sole question of jurisdiction.

Huntington vs. Laidley, 176 U. S. 669, 44 L. Ed. 630.

Courtney vs. Pradt, 196 U. S. 89, 49 L. Ed. 398.

McLish vs. Roff, 141 U. S. 661, 35 L. Ed. 893.

In Huntington vs. Laidley, supra, the Court said:

" • • • the question whether the procedings in any or all of the suits at law or in equity in the state court afforded a defense—either by way of res adjudicata or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The circuit court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court upon a direct appeal upon the question of jurisdiction only, to decide the question of merits, except

in so far as it bears on the question whether the court below had or had not jurisdiction of the cause."

And, as held in Courtney vs. Pradt, supra:

"The record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction; that is, of the jurisdiction of the court as a court of the United States."

Speaking of the proper construction of the Act of March 3, 1891, the Court said in McLish vs. Roff, supra:

"The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment. When that judgment is rendered the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circiut Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

In this connection we desire to call attention to the fact, as mentioned in the statement of the case, that in the instant case the appellant bank has also taken a petition to superintend and revise the whole case to the Circuit Court of Appeals for the Fifth Circuit, and that proceeding is now pending in that court. However, the appeal to this Court was filed first.

The FIFTH GROUND of the motion is to the effect that the constitutional questions attempted to be injected into the case by the appellant, namely: that it was deprived of its constitutional right to a trial by jury; and that to enforce the judgment rendered, would constitute a taking of its property without due process of law, are frivolous and should not be considered.

It is too well settled to require argument, that, all proceedings in bankruptcy, except as to the committing of the act of bankruptcy charged, and whether or not the bankrupt was insolvent, are in equity, and there is no constitutional right to trial by jury. Barton vs. Barbour, 104 U. S. 126, 26 L. Ed. 672.

Nor is there a right to a trial by jury in a matter involving contempt of court, as here. Acts Bankruptcy, Sec. 41, sub. sec. (a) and (b). That courts have the inherent right to punish for contempt for failure to obey their lawful orders, without the interposition of a jury, needs no citation of authority.

Nor is the enforcement of a summary order in bankruptcy imprisonment for debt, as prohibited by the Constitution. Collier on Bankruptcy, (12th Ed.) 694, and cases cited.

Nor does a question here arise under the Fifth Amendment to the Constitution, "That no person shall be deprived of life, liberty or property without due process of law," as claimed by appellant. This proposition, as applied to this case, is wholly frivolous and needs no argument.

The nature of the case was such that the enforcement of the order was principally remedial and designed to secure to the appellee the fruits of his victory in the summary order proceedings; and it was not beyond the jurisdiction of the court to assess a fine against appellant in the amount of the summary order, collectible by execution; and also an additional fine of $2500.00, half of which was payable to the government to vindicate the outraged dignity of the court, and half to the appellee.

Toledo Scale Co. vs. Computing Scale Co., 261 U. S. 399; 67 L. Ed. 719.

Merchants Stock & Grain Co. vs. Board of Trade of City of Chicago (C. C. A., 8th Cir.) 201 Fed. 20, 120 C. C. A. 582 (Aff. Supt. Ct. 223 U. S. 640; 56 L. Ed. 584.

As said by Honorable Chief Justice Taft in Toledo Scale Co. vs. Computing Scale Co., supra:

> "The decree of punishment for contempt in such case is in the discretion of the court whose dignity has been offended and whose process has been obstructed. New Orleans vs. New York Mail S. S. Co., 20 Wall. 387, 22 L. Ed. 354. Certainly it was not an abuse of discretion in this case to impose as a penalty compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court."

And as said in Merchants Stock & Grain Co. vs. Board of Trade, supra:

> "Where the contempt has been both of the court and of the rights of the adverse party, it has been quite frequently the custom to divide the fine between the government and the injured party." Citing Carey Manf. Co. vs. Acme Flexible Clasp Co., 187 U. S. 427; 47 L. Ed. 244; Matter of Christensen Engineering Co., 194 U. S. 458; 48 L. Ed. 1072.

The appeal may be dismissed and a penalty assessed for delay.

As held in Wagner Electric Manufacturing Co. vs. Lyndon, 262 U. S. 225; 67 L. Ed. 961:

> "The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. Deming vs. Carlisle Packing Co., 226 U. S. 102; 57 L. Ed. 140."

The summary order in the case at bar, together with

the fine assessed of $2500, amounts to the sum of $16,335.00.

This appeal should not be transferred to the Circuit Court of Appeals, for the reason that an appeal from the same decree is already pending in that Court.

We are aware of the Act of September 14th, 1922, Revised Statutes Art. 1215-A, Judicial Code Sec. 238-A as added, authorizing the transfer of appeals from the Supreme Court to the Circuit Courts of Appeals where it appears that the appeal was wrongfully taken to this Court. However, we respectfully urge that this Act should not be invoked in the instant case for the reason that, as shown by the Statement of Facts (p. 10), supra), the appellant herein has also taken an appeal from the identical order here complained of, to the Circuit Court of Appeals for the Fifth Circuit, which last named appeal is now pending in that Court.

Inasmuch as that Court will act on the appeal now pending there in due course, there can be no reason to transfer the appeal from this Court to the Circuit Court of Appeals and thus require that Court to determine the identical cause again. Such procedure would in effect cause the Circuit Court of Appeals to entertain two appeals from the same judgment.

Nor is it an answer to say that the Circuit Court of Appeals could dismiss one appeal and act on the other, because this would unnecessarily prolong the litigation. If this case is transferred, the transfer could not be effected in time to place the case so transferred on the docket for submission at the present term of the Circuit Court of Appeals. This would mean that it could not be submitted until the Fall Term, 1925, and would give the appellant another year's delay in complying with the order. Whereas, if this appeal is dismissed or affirmed, then the Court of Appeals will in all probability act on the

appeal taken directly to it at the present term, and thus terminate the litigation.

Having already taken an appeal directly to the United States Circuit Court of Appeals, appellant should not now be permitted to have the appeal to the Supreme Court transferred to the Court of Appeals.

Wherefore, the appellee respectfully prays that this appeal be dismissed with costs and that an appropriate penalty be assessed against appellant for delay.

Respectfully submitted,
GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

Mark McMahon

Fort Worth, Texas.
ORESTES MITCHELL,
of St. Joseph, Mo.,
Of Counsel

The State of Texas,
County of Tarrant.

Stanley Boykin, being duly sworn, on oath states that he is one of counsel for the appellee in the above styled and numbered cause and that he has read the above and foregoing motion and the brief, argument and statement of facts appended thereto, and that the matters of fact therein stated are true.

Stanley Boykin

Sworn to and subscribed before me this the 3rd day of Sept., 1924.

Jean Tinsley

Notary Public, Tarrant County, Texas.

My commission expires June 1, 1925.

NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

Farmers and Mechanics National Bank of Fort Worth, Texas, Appellant,

vs.

W. W. Wilkinson, Trustee of the Walker Grain Company, Bankrupt, Appellee.

To the Farmers and Mechanics National Bank of Fort Worth, Texas, Appellant herein, or Messrs. G. A. Stultz, W. E. Spell, Clay Cooke, J. A. Templeton, Attorneys for said Appellant:

Please take notice that on the annexed verified statement of facts herein and on all the papers and proceedings herein, we shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, the sixth (6th) day of October, A. D. 1924, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion to dismiss or affirm of which the foregoing is a copy and that we shall submit with said motion and in support of the same the brief and argument attached to said motion of which the above and foregoing is a copy.

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

Mark McMahon

Fort Worth, Texas.

The State of Texas,
County of Tarrant.

H. C. Ray, being duly sworn on oath, states that he is one of counsel for the appellee in the above styled and

numbered cause and that on the 3rd day of Sept., A. D. 1924, he delivered to J. A. Templeton, one of counsel for the appellant herein, a true copy of the above and foregoing motion to dismiss or affirm, and brief and argument thereon together with the above notice of submission of the said motion in the Supreme Court of the United States.

H. C. Ray

Sworn to and subscribed before me this the 3rd day of Sept, 1924.

Jess Tucker

Notary Public, Tarrant County, Texas.

My commission expires June 1, 1925

NOV 24 192
WM. R. STANSB
CL

In The

Supreme Court of the United States

OCTOBER TERM, 1924

—o—

No. 487

—o—

FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee.*

—o—

Appellee's Additional Argument on Motion to Dismiss or Affirm

—o—

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

ORESTES MITCHELL,
Of St. Joseph, Mo.,
Of Counsel.

ROBERTSON, 907 THROCKMORTON STREET—IN THE BASEMENT—FORT WORTH

In The

Supreme Court of the United States

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FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee.*

—o—

Appellee's Additional Argument on Motion to Dismiss or Affirm

—o—

Statement.

It was pointed out to the Court in appellee's original motion to dismiss or affirm that the same questions presented here had been taken by the appellant herein to the Circuit Court of Appeals for the Fifth Circuit on motion to superintend and revise the decree of the District Court, from which decree it has also appealed to this Court. Since the filing of appellee's said original motion to dismiss in this Court, the said petition to superintend and revise has been submitted to the Circuit Court of Appeals on the merits; and every question raised on the

appeal to this Court was raised in said Circuit Court of Appeals by assignments of error, by written briefs, and by oral argument, as shown by certificate of the Clerk of said Court hereto attached, together with certified copy of the record in said proceedings.

PROPOSITION HEREUNDER.

When two proceedings for review are each pending at the same time, one in the Supreme Court, and one in the Circuit Court of Appeals; and the appellant or petitioner, submits the cause on the merits to the Circuit Court of Appeals, he elects to pursue that mode of review, and the proceedings in the Supreme Court should be dismissed.

Authorities.

As said by this Honorable Court in the case of *Robertson v. Caldwell*, 165 U. S. 359, 41 L. Ed. 745:

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals. As no question of jurisdiction was certified by the Circuit Court of Appeals, and as the defendant chose not to await the action of this Court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole

case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court."

And as was said by this Honorable Court in the case of *McLisk v. Roff*, 141 U. S. 661, 35 L. Ed. 893:

"It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this Court, while the case on its merits would be certified to the Circuit Court of Appeals, that the case would be before two separate appellate courts at one and the same time, and that the Supreme Court might dismiss the suit upon the question of jurisdiction while the Circuit Court of Appeals might properly affirm the judgment of the lower court upon the merits. The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time in two appellate courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of

> Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court.
>
> "The writ of error is dismissed."

In the case of *Cincinnati H. & D. Ry. Co. v. Theibaud*, 177 U. S. 615, 44 L. Ed. 911, this Honorable Court, quoting from its decision in *Carter v. Roberts*, says:

> "In Carter vs. Roberts, 177 U. S. 496, ante. 861, 20 Sup. Ct. Rep. 713, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals, those Courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the Act of March 3, 1891."

While the Honorable Circuit Court of Appeals has not yet rendered its decision in the case, yet the whole case has been submitted to it, and a decision upon the merits is bound to follow.

The cause has not yet been submitted in this Honorable Court on the merits; but is pending here

upon a motion to dismiss or affirm. It is obvious that, under the above decisions, the appellant, by submitting the whole case to the Circuit Court of Appeals, has waived his right to a review in this Court.

* * * * * *

We desire to submit an additional point with reference to the lack of jurisdiction in this Honorable Court to entertain the appeal. This point is patent and arises on the face of the record, viz:

The Supreme Court of the United States has no jurisdiction by either appeal or writ of error, to review the action of a District Court in a contempt proceeding; an appeal or writ of error in such case lies directly to the Circuit Court of Appeals, and the Supreme Court can take jurisdiction only by writ of certiorari from the Circuit Court of Appeals.

Authorities.

This is clearly held by this Honorable Court in the case of *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997, in which an extensive review of the authorities on this question is made. The Court quotes from earlier cases as follows:

> "Judgments in proceedings in contempt are not reviewable here on appeal or error. Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95; Re Debs, 158 U. S. 564, 573, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, 159 U. S. 251, 15 Sup. Ct.

Rep. 1039. But they may be reached by certiorari, in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record, so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank, and to dismiss the other, may be revised and annulled."

WHEREFORE, appellee respectfully submits the above propositions and authorities and prays that this Honorable Court consider the same.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
ORESTES MITCHELL,
BOYKIN & RAY,

Counsel for Appellee.

STATE OF TEXAS,
COUNTY OF TARRANT

Before me, the undersigned authority, on this day personally appeared H. C. Ray, who, being by me first duly sworn, on oath states that he is one of counsel for the appellee in the above styled and numbered cause, and that on the_____day of November, 1924, he delivered a true copy of the above and foregoing brief and argument to Mr.

_____, one of counsel for appellant herein.

_____

Subscribed and sworn to by H. C. Ray, before me, this the_____day of November, 1924.

_____

Notary Public, Tarrant County, Texas.

My commission expires June 1st, 1925.

In the

Supreme Court of the United States

OCTOBER TERM, 1924

No. 457

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee*

APPELLEE'S REPLY TO MOTION FOR REHEARING

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
OBESTER MITCHELL,
Attorneys for Appellee.

In the

Supreme Court of the United States

OCTOBER TERM, 1924

—o—

No. 487

—o—

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee*

—o—

APPELLEE'S REPLY TO MOTION FOR REHEARING

—o—

Now comes the appellee in the above cause and replying to the motion for rehearing of the appellant herein respectfully shows to the Court:

I.

That all of the contentions advanced in said motion for rehearing were before this Honorable Court on the appeal of the appellant herein, and the motion of the appellee herein to dismiss said cause for want of jurisdiction, and that no new questions are raised in said motion for rehearing

II.

We respectfully beg leave to call attention of the Court to the following statements in said motion for rehearing which are at variance with the record.

(a) The statement made in assignment of error No. 3 on page 4, quoting a part of the trustee's motion before the referee in which the trustee alleged that the payment made to the bank amounted to a preference, omits the further allegation of the trustee in said motion, and the prayer therein that said sum of money be ordered restored to him by summary order. (R. 1-2.)

(b) The statement made upon page 5 of said motion for rehearing to the effect that the appellant appeared before the referee solely to object to the jurisdiction, and that the referee made his order only upon evidence received by him at the general examination of the bankrupt, is not borne out by the record. The record shows that the appellant appeared before the referee in response to notice duly given of the trustee's motion, and in addition to objecting to the jurisdiction, pleaded fully to the merits of the case (R. 3). Furthermore, it is shown that two officers of the bank gave their oral testimony before the referee in connection with the merits of said cause, to-wit, Mr. Renfro, cashier, and Mr. Colvin, president, (Record on proceedings for certiorari from the decision of the Circuit Court of Appeals in this case, pp. 73 and 119, cause No.

828, October 10, 1923, in this Court.) Furthermore, the findings and conclusions of the referee in bankruptcy stated that the evidence upon the merits was fully heard after due notice. (R. 7.)

(c) The statement that the Honorable Circuit Court of Appeals simply dismissed the appeal from the order of the District Court, and denied the petition to superintend and revise taken from that order, without passing upon the merits of the case, is at variance with the record, and also with the decisions of this Honorable Court handed down herein, on January 5th, 1925. See opinion of Circuit Court of Appeals, Fifth Circuit, in this cause, 295 Fed. 120, and certiorari denied by this Honorable Court, 264 U. S. 588.

That this case was adjudicated on the merits by the Circuit Court of Appeals is plainly shown by its opinion rendered herein, *Farmers & Mechanics National Bank v. Wilkinson*, 295 Fed. 120, in which the Court said:

> "We understand it to be well settled that, as to the bankrupt's property, the hands of the bankrupt and of his creditors are stayed from the date of the filing of the bankruptcy petition, and that his estate then passes actually or potentially into the control of the bankruptcy court. Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. *There*

is no color of right in the bank to retain money received by it from the bankrupt under the circumstances disclosed in the referee's findings, and the payment to the trustee of the amount so acquired, with interest thereon, may be required by an order in a summary proceeding. Reed v. Barnett National Bank, 250 Fed. 983, 163 C. C. A. 233. (Italics ours.)

"As to the contention that some of the referee's findings were unsupported by the evidence, it is enough to say that the record does not sustain that contention."

From that decision of the Circuit Court of Appeals the appellant here took petition for certiorari to this Court which petition was denied, 264 U. S. 588.

From the above decision it is apparent that appellant's statement that it has had no review in the Circuit Court of Appeals on the merits of the summary order complained of here, is not supported by the record.

(d) Statement in assignment of error No. 7, page 6, that the District Court on the contempt proceeding refused to hear any evidence is at variance with the record as the decree of said Court shows that the Court fully entertained and heard the answer of the respondent bank, to which the affidavits, containing the evidence referred to were attached, and also motion for rehearing thereon, to which said affidavits and additional affidavits were also attached. (R. 47 and 64.)

There is no merit in appellant's contention that it did not receive the money sought to be recovered by the summary order complained of. The evidence is undisputed in the record that the appellant succeeded to all the assets and rights and assumed all liabilities of the defunct American National Bank. Under such circumstances there can be no question but that the successor bank is liable for the accounts of its predecessor. It might be possible that through the mutations of the banking business the successor bank did not come into possession of the identical ear-marked money of its predecessor; but it took over all its assets and thus got the benefit of the said money or its mutations or proceeds. The general rule as to the liability of a corporation which consolidates with another is stated in Vol. 14 A, C. J. 1072, as follows:

> "A consolidated corporation is answerable for the debts, obligations and liabilities of the constituent corporations, whether arising ex contractu or ex delicto. This is true not only where liability is imposed on the consolidated corporation by statute, or by charter of the consolidated company, or by the agreement of the consolidation, but also where the constituent corporations go out of existence without any arrangement as to payment of their debts and liabilities. * * * Outside of debts, liabilities and obligations subsequently incurred by it, for which, of course the consolidated corporation is liable, the liability of the consolidated corporation is for such debts, obligations and liabilities of the constituent corpora-

tions as existed at the date of the consolidation, without enlargement, diminution or modification. It extends to and includes all obligations imposed by charter or by statute upon one of the constituent corporations."

Furthermore, the United States Revised Statutes (1916), Secs. 9662 to 9664, expressly prohibit a National Bank from escaping a debt in the manner here attempted:

"*Art. 9662. Effect of Change of Name or Location.*

"Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same state, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association."

"*Art. 9663. Effect of Change of Name on Debts, Liabilities, etc.*

"All debts, liabilities, rights, provisions and powers of the association under its old name shall devolve upon and inure to the association under its new name."

"*Art. 9664. Liabilities and Suits Not Affected by Change of Name.*

"Nothing in this act shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability or affect any action or proceeding at law in which said association may be or become a party or interested."

We respectfully urge that there is no merit in appellant's assignment of error, and further that in any event, this was a defensive matter which was fully presented, and adjudicated on the merits in the decision of the Circuit Court of Appeals herein above referred to and from which decision petition for certiorari was denied by this Court. As stated by this Court in its opinion herein of January 5th, 1925: "The power here to review that decree had been exhausted; but in any event it could not be exercised upon direct appeal or error."

* * * * * *

However, all of the above matters raised in the motion for rehearing go to the merits of the case heretofore decided by the Honorable Court of Civil Appeals, and certiorari denied by this Honorable Court, and this Honorable Court has held that it has no jurisdiction to entertain this appeal. Furthermore, this Honorable Court has held that it has no jurisdiction to entertain a direct appeal from the order of the District Court imposing a fine for contempt. See opinion of this Honorable Court herein handed down on January 5th, 1925.

* * * * * *

We desire also to call this Honorable Court's attention to the fact that the petition to superintend and revise the said order of the District Court from which the direct appeal was also taken to this Court, was by the Honorable Circuit Court of Appeals, Fifth Circuit, fully adjudicated and denied

by its opinion handed down on January 24th, 1925, a copy of which we are filing herewith. And under the authorities of *Robertson v. Caldwell*, 165 U. S. 559, 41 L. Ed., 745, and *McLisk v. Roff*, 141 U. S. 661, 35 L. Ed. 893, cited to Your Honors in the briefs on the motion to dismiss this cause, the appellant has waived its right, if any it ever had, to be heard in this Court.

WHEREFORE, appellee prays that said motion for rehearing be denied.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
ORESTES MITCHELL,
Attorneys for Appellee.

Of Counsel.

THE STATE OF TEXAS }
COUNTY OF TARRANT }

H. C. Ray, being duly sworn, on oath states that he is one of counsel for the appellee herein and that a true copy of the above and foregoing brief and argument has been this day delivered to_____ _____, one of counsel for appellant.

_____

Sworn to and subscribed by H. C. Ray before me this, the _____day of January, 1925.

_____
Notary Public, Tarrant County, Texas.

My commission expires June 1st, 1925.

FARMERS & MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *v.* WILKINSON, TRUSTEE, AND THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 487. Motion to dismiss submitted October 6, 1924.—Decided January 5, 1925.

1. When a decree of the District Court has been affirmed by a decree of the Circuit Court of Appeals which this Court has

declined to review by certiorari, questions concerning its validity and merits cannot be reopened either by the District Court or through an attempted review in this Court, by direct appeal or writ of error, of the order enforcing the mandate. P. 506.

2. An order of the District Court inflicting punishment for contempt is not ordinarily reviewable in this Court by direct appeal or writ of error. *Id.*

3. Of writ of error and appeal, the former is the appropriate mode of review in criminal contempts; but c. 448, § 4, 39 Stat. 727, renders the distinction unimportant. P. 507.

4. An order of the District Court punishing a party for contempt in disobeying an order made to enforce a mandate from the Circuit Court of Appeals, cannot be reviewed here by direct writ of error upon the grounds that it exceeded the District Court's jurisdiction and infringed constitutional rights, where these questions were foreclosed by the decree of the Circuit Court of Appeals upon which the mandate issued. *Id.*

Appeal dismissed.

APPEAL from an order of the District Court commanding the appellant to make a payment, as ordered by a referee in bankruptcy, and fining the appellant for contumacy in having refused to do so. The referee's order was made in pursuance of a mandate from the Circuit Court of Appeals. See 295 Fed. 120.

Mr. Mark McMahon, for appellee, in support of the motion to dismiss or affirm. *Mr. George M. Conner* and *Mr. Orestes Mitchell* were also on the briefs.

Mr. Charles A. Boynton, for appellant, in opposition to the motion. *Mr. W. E. Spell, Mr. Clay Cooke, Mr. J. A. Templeton* and *Mr. G. A. Stultz* were also on the brief.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Walker Grain Company, on July 27, 1918, borrowed from the American National Bank of Fort Worth, Texas, $10,000, for which it executed its demand note

payable to the bank. August 16th following, a petition in bankruptcy was filed against the Grain Company, upon which it was adjudicated a bankrupt. After the petition was filed the bankupt paid the amount of the note, and, thereafter, appellant succeeded to all the assets and rights and assumed all the liabilities of the American National. Upon these facts the trustee in bankruptcy filed a motion with the referee to summarily require appellant to restore the amount of such payment. Appellant, by proper pleading, denied the jurisdiction of the referee, insisted that the trustee should proceed by a plenary suit, and alleged that the note was secured by property of the bankrupt and that the payee bank was entitled to priority of payment. The referee found that the note was not so secured, that appellant had no color of right to the payment made after the commencement of the bankruptcy proceedings, and ordered appellant to pay over to the trustee the amount received. The findings and conclusions of the referee were approved by an order of the district court, and its order was affirmed upon petition to revise by the court of appeals for the fifth circuit, 295 Fed. 120; and this court denied a petition for certiorari. 264 U. S. 588. After the mandate had gone down to the district court, the referee ordered appellant to comply therewith, but appellant refused to do so, which refusal was certified to the district court for its action. At the same time the trustee moved the court for an order to compel compliance with the mandate. After a hearing the district court found appellant guilty of contempt, and, in addition to commanding payment of the amount ordered by the referee, imposed a fine of $2,500, as punishment for appellant's contumacious behavior, one-half payable to the United States and one-half to the trustee in bankruptcy. From this order appellant has not only taken this appeal but also a petition to revise to the circuit court of appeals for the fifth circuit.

Appellee has submitted a motion to dismiss the appeal or affirm the decree of the district court upon the grounds, among others, that this court is without authority to entertain the appeal, and that there is no substance in the questions sought to be presented. The motion to dismiss must be granted.

Upon the appeal here appellant seeks a review of the order adjudging appellant in contempt and also of the jurisdictional issues disposed of by the original decree approving the action of the referee which the circuit court of appeals refused to disturb. All questions concerning the validity and merits of that decree were finally disposed of by the decree of the circuit court of appeals and the denial of the application for a certiorari by this court. The district court was bound to give effect to the decision of the circuit court of appeals; so that what, in effect, we are asked to do is to review and reverse the decree of the latter. The power here to review that decree has been exhausted; but, in any event, it could not be exercised upon direct appeal or error. *Brown* v. *Alton Water Co.*, 222 U. S. 325, 331–334; *Carter* v. *Roberts*, 177 U. S. 496, 500; *Union Trust Co.* v. *Westhus*, 228 U. S. 519, 522–524; *Metropolitan Co.* v. *Kaw Valley District*, 223 U. S. 519, 522–524; *Shapiro* v. *United States*, 235 U. S. 412, 415–417.

It follows that the only questions open for consideration are those arising from the contempt order. But that order, being in part punitive, takes character from its criminal feature and, ordinarily, such an order is not open to review by this court upon direct appeal or error. *O'Neal* v. *United States*, 190 U. S. 36, 38; *Hayes* v. *Fischer*, 102 U. S. 121, 122; *In re Chetwood*, 165 U. S. 443, 462. And see *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110–111; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–338; *Matter of Christensen Engineering Co.*, 194 U. S. 458, 461; *In re Merchants' Stock Co.*, 223 U. S. 639,

641–642 It may be said in passing that the case is here upon appeal not upon writ of error, the appropriate mode of review in criminal contempts; but that is unimportant under c. 448, § 4, 39 Stat. 726, 727, requiring disregard of such mistakes.

Appellant insists, however, that the jurisdiction of this court attaches upon the grounds that the district court was without jurisdiction to make the order and that there was a denial of constitutional rights. See *Grant* v. *United States*, 227 U. S. 74, 78–79. Jurisdiction of the district court here over the person and over the subject-matter of contempts is beyond question; and the challenge to the jurisdiction, as well as the assumed denial of constitutional rights, apparently, are made to rest only upon the assertion that it was not within the power of the referee or the district court, as a court of bankruptcy, to require the bank, by a summary order, to restore to the trustee the amount of the payment in question; the contention being that the only remedy was by plenary action with the right of trial by jury. But, since the decision of the circuit court of appeals, as already stated, is conclusively against appellant upon that issue, and prevented any further consideration of it by the district court, the asserted basis for a direct resort to this court is without any substance.

Appeal dismissed.

END

OF

CASE